J. T. MERRITT, *Appellant*,

v.

RICHLAND IRRIGATION DISTRICT [illegible]
[illegible] Defendant; C. [illegible]
STOCKMAN [illegible]
of the Richland Irrigation [illegible]
Son Bryant, and H. [illegible]
ners of Benton County, [illegible]
OTOE IRA C. HAWLEY, [illegible]
County Commissioners of Benton [illegible]
ington, Defendants; J. T. [illegible]
LAND, CHARLES [illegible]
and H. K. DAVENPORT, [illegible]
Trustee, Intervenor, *Appellee*.

APPEAL FROM THE SUPREME COURT
THE STATE OF WASHINGTON.

BRIEF AND ARGUMENT OF APPELLANT.

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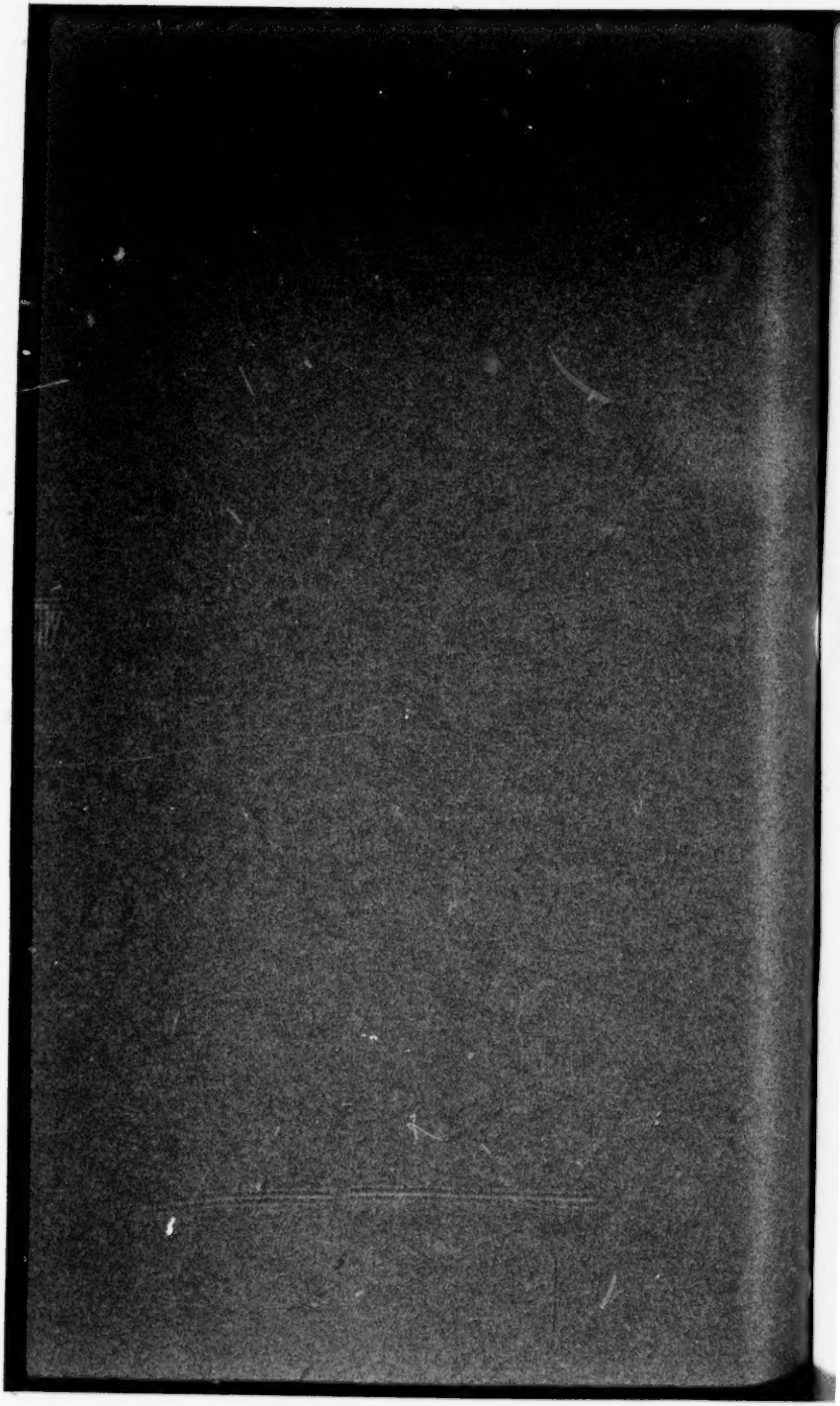

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1932.

No. 516

J. T. ROBERTS, *Appellant,*

vs.

RICHLAND IRRIGATION DISTRICT, an Irrigation District; C. J. BARNETT, W. A. STOCKMAN, and W. C. McINNIS, Directors of the Richland Irrigation District, an Irrigation District, and HARRY FORSYTH, Treasurer of Benton County, Washington; B. J. PACIUS, IRA C. HAWLEY, and H. S. HUGHES, County Commissioners of Benton County, Washington, Defendants; J. T. S. LYLE, DIX ROWLAND, CHARLES HEATH, T. H. BOWDEN and H. E. DAVENPORT, individually and as Trustees, Intervenors, *Appellees.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF AND ARGUMENT OF APPELLANT.

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STATEMENT OF THE CASE.

In this action, the Appellant Roberts seeks to enjoin the levy of an assessment against his lands by the Appellee Irrigation District upon the ground that such a levy substantially exceeds the benefits conferred on the land assessed by the improvements for the payment of which the levy is made, and so constitutes a taking of property without due process of law in contravention of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The facts are undisputed. This is an appeal from the judgment of the Supreme Court of the State of Washington which affirmed, with costs, a judgment of the Superior Court of Benton County, Washington (R. 30.), which sustained demurrers to Appellant's complaint and (upon Appellant's refusal to plead further) dismissed it with costs. (R. 18.)

The material facts alleged in the Complaint

(R. 1.) and admitted by the demurrers (R. 15, 16, 17.) are in substance as follows:

The Appellant, on January 1, 1919, was and at all times since has been the owner of forty acres of land in Benton County, Washington; the Richland Irrigation District was organized, and the Appellant's land included therein over his objection; the Irrigation District has expended the sum of $538,000.00 in developing irrigation facilities for land within the boundaries of the District to pay for the cost of which bonds in the sum of $538,000.00 were authorized and issued by the Richland Irrigtion District on July 1, 1920. These bonds bore interest at the rate of six (6%) per cent per annum.

Prior to the time the District was organized or improvements constructed, the Appellant owned a valuable water right appurtenant to his land; by reason of the improvements constructed by the Richland Irrigation District, Appellant's land and water right were benefited in the sum of $10.00 per acre on the irrigable portion of his land; thirty-five acres of the Appellant's land were irrigable; *the total benefit to Appellant's land and water right, by reason of the improvements made by Richland Irrigation District aggregated the sum of $350.00.*

> "That no other benefits of any description accrued to this Appellant or to the lands owned by him by reason of the acquirement of said additional water rights, the making of said improvements, or the expenditure of any funds by said District, in excess of the sum of $350.00." (R. 4.)

The total liability of the Appellant's land for principal and interest on said bonds was the sum of $560.00. (R. 5.) During the years of 1920 to 1929 inclusive, the Board of Directors of the Richland Irrigation District, for the purpose of paying interest and principal on the bonds issued by it, levied the total sum of $1,168.85 against the lands of Appellant. (R. 5, 6.) For the purpose of protecting his title, the Appellant paid these assessments.

The Appellees have made all preparation for and are threatening to levy assessments against the land of the Appellant in 1931 in the sum of $757.53;

> "That the threatened levy of $757.53 is to be made upon a fundamentally wrong and illegal theory and basis in this: That no part of said levy is made on account of or with reference to any special benefits accruing to the real property of the Plaintiff hereinabove referred to. That said assessment has been levied for the purpose of creating a fund to take up or eliminate the deficiencies in the bond interest and bond retirement funds of said Irrigation

District, *due wholly or in part to a failure of certain landowners within the District to pay assessments which have heretofore or will hereafter be levied against lands in said District belonging to such other persons.*" (R. 6.)

The Directors of the Richland Irrigation District have stated to this Appellant that it is their fixed policy and intention to assess and re-assess all delinquencies, which have heretofore or may hereafter accrue, against the lands of this Appellant and other tenants of the District, who continue to pay their assessments without delinquencies, until such assessments will create a fund sufficient to pay the entire outstanding indebtedness so as to retire said bonds, both principal and interest; *and that they propose to make such assessments without reference to the special benefits which have accrued to the real property of the Appellant and any other landowners in the District who continue to pay their assessments, but that they will be governed in making said assessments solely by a consideration of the amount of money required to pay said indebtedness, principal and interest.* (R. 6, 7.)

The threatened levy by the Appellees is equal to or greater than the gross income derived from the produce of this land. It is in substantial excess of the net income derived therefrom, and the threat-

ened levy for 1931 is equal to or in excess of one-third of the reasonable market value of the property. (R. 7.) Further assessments on the same theory and basis for the year 1932 and successive years will exceed the total value of the property and be in substantial excess of any benefits received by reason of the aforesaid improvements. The threatened levy, if made, will create an apparent cloud on Appellant's title and destroy the marketability of his land, and will cause the Appellant irreparable damage. (R. 7, 8.)

The Appellees are the Irrigation District, its officers, the officers of the County, through whose offiicial acts the threatened assessment will be made and enforced, and the Intervenors, individually and as Trustees, who are the holders of a substantial portion of the said bonds of the district.

The Irrigation District and its officers, the officers of Benton County, and the Intervenors, filed their separate demurrers. The Trial Court sustained all of the demurrers upon the authority of *State ex rel Wells v. Hartung, et al.*, 150 Wash. 590, 274 Pac. 181. (R. 18.) The Appellant refused to plead further, and judgment of dismissal and for costs was entered (R. 18.), from which the Appellant appealed

to the Supreme Court of the State of Washington. (R. 20.)

The Supreme Court of the State of Washington entered judgment affirming that of the lower court. (R. 30.) Thereupon, an appeal was taken to this Court, and is docketed herein as Cause No. 516 of the October Term, 1932.

The statute, the validity of which was drawn into question herein, is the Irrigation district law of the State of Washington. The relevant portions of the statute are summarized in an appendix hereto.

At this point we only call attention to Remington's Revised Statutes of Washington, Sections 7417-1 and 7417-2 (Appendix ii.), which set forth the purposes and powers of an irrigation district, and Remington's Revised Statutes of Washington, Section 7436 (Appendix vi.), which states that irrigation district assessments must be made according to benefits, and Remington's Revised Statutes of Washington, Section 7434 (Appendix v.), upon which the State Court primarily rests its opinion, to-wit:

> "Said bonds and interest thereon * * * shall be paid by revenue derived from an annual assessment upon the real property of the district, *and all the real property in the district shall be and remain liable to be assessed for such*

payments until fully paid as hereinafter provided." (Italics ours.)

Roberts v. Richland Irrigation District, et al., 69 Wash. Dec. 108, 112; 13 Pac. (2d) 437, 439 (R. 26.),

and Remington's Revised Statutes of Washington, Sections 7443 to 7445 (Appendix ix.), which provide that acquired property may be sold at its reasonable market value.

The opinion of the State Supreme Court sets forth and applies what is known in the West as "the Doctrine of the Last Faithful Acre"—namely, that, though an irrigation district exercises no governmental functions but has only those powers which are expressly conferred upon it by statute (Appendix ii.), yet it may levy assessments against an individual landowner, for the payment of improvements erected by it, in substantial excess of the benefits conferred upon his lands by such improvements. After the landowner has paid the full amount of his benefits, he may thereafter be assessed to pay for the benefits to other landowners in the district who have defaulted in their payments, and the amount of such assessments, for the delinquencies of others, is limited only by the requirements of the outstanding bonds. While such assessments for the delinquencies of others must be pro-

portionately levied, the amount thereof is limited only by the amount of the bonded obligation, from which it follows that, if all landowners save one within a district cease payments, their delinquencies may be assessed and re-assessed against the last faithful acre until it has paid an amount sufficient to liquidate the entire bonded indebtedness. The Appellant challenges this holding upon a consideration of fundamental principles and constitutional rights. The constitutional question involved far transcends the individual monetary problem presented; it is one of paramount importance to thousands of struggling, tax-burdened farmers in the irrigated districts in the West.

ASSIGNMENT OF ERRORS.

I.

The Supreme Court of the State of Washington erred in affirming the order of the Superior Court for Benton County of the State of Washington sustaining demurrers of all adverse parties to Appellant's complaint.

II.

The Supreme Court of the State of Washington erred in sustaining the judgment of the Superior Court for Benton County, of the State of Washing-

ton, dismissing Appellant's complaint with costs upon his refusal to plead further after demurrers thereto of all adverse parties had been sustained.

III.

The Supreme Court of the State of Washington erred in overruling the contention of the Appellant that the irrigation district law of the State of Washington (Appendix i.) as applied, was repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States, and in holding that the said statute as applied is valid and does not transgress the due process clause of the Fourteenth Amendment to the Constitution of the United States.

IV.

The Supreme Court of the State of Washington erred in holding that the Legislature of the State of Washington has the power, by statutory enactment, to confer upon an irrigation district the power to levy local improvement assessments in substantial excess of and wholly without regard to benefits conferred upon the real property assessed, and that a statute expressly conferring such power does not contravene the due process clause of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT.

This appeal presents the following question for determination:

Does the Irrigation District statute of the State of Washington (Appendix i.) transgress the Fourteenth Amendment to the Federal Constitution, in that, by its express terms, and by judicial construction thereof, and by its application, it takes property without due process of law by authorizing the levy of assessments by an irrigation district in substantial excess of the benefits to the lands assessed, solely for the purpose of paying for benefits conferred upon the lands of others in the district who have defaulted in their payments?

If the answer to this question is in the affirmative, the Appellant has a cause of action, and the judgment should be reversed. If in the negative, he has no cause of action and the judgment should be affirmed.

In support of Appellant's contention we propose to establish the following propositions:

I.

That there is a difference, universally recognized by authorities, between the power to tax for general governmental purposes and the power to levy assessments for local improve-

ments, and that the difference affects the circumstances under which and the extent to which each may be levied.

II.

That the levy made by the directors of an irrigation district is a special assessment for a local improvement and is governed by the rules of law relating thereto.

III.

That an assessment against a particular piece of land for local improvements, in substantial excess of the benefits accruing to that particular land by reason of the improvements, constitutes a taking of property without due process of law.

IV.

That the Washington Irrigation District statute, as construed and applied by the Supreme Court of that State, in the instant case, authorizes a levy of special assessments against a tract of land for local improvements in substantial excess of the benefits accruing to such land by reason of the improvements; and, as so construed and applied, contravenes the due process clause of the Fourteenth Amendment to the Constitution of the United States.

I.

THAT THERE IS A DIFFERENCE, UNIVERSALLY RECOGNIZED BY AUTHORITIES, BETWEEN THE POWER TO TAX FOR GENERAL GOVERNMENTAL PURPOSES AND THE POWER TO LEVY ASSESSMENTS FOR LOCAL IMPROVEMENTS, AND THAT THE DIFFERENCE AFFECTS THE CIRCUMSTANCES UNDER WHICH AND THE EXTENT TO WHICH EACH MAY BE LEVIED.

The power of levying and collecting taxes is a power that inheres in sovereignty. It is an indispensable attribute to the existence and maintenance of government.

1 Cooley on Taxation, p. 149, Sec. 57, 4th Ed.

Taxes are of two kinds, general taxes for general purposes of government and special taxes for local improvements. While in common parlance they are treated as similar, there is a substantial difference in (1) the constitutional basis on which they are justified, (2) the purposes for which revenue is used, and (3) the extent to which they may be levied. The distinction between the two is clearly drawn by text writers:

> "The difference between a special assessment and a tax are that (1) a special assess-

ment can be levied only on land; (2) a special assessment cannot (at least in most states) be made a personal liability of the person assessed; (3) a special assessment is based wholly on benefit; and (4) a special assessment is exceptional both as to time and locality. The imposing of a charge on all property, real and personal, in a prescribed area, is a tax and not an assessment, although the purpose is to make a local improvement on a street or highway. A charge imposed only on property owners benefited is a special assessment rather than a tax, notwithstanding the statute calls it a tax.

"The power to levy such assessment is undoubtedly an exercise of the taxing power, but the exercise of the taxing power in imposing an assessment does not necessarily make the assessment a tax."

1 Cooley on Taxation, pp. 106-7, Sec. 31, 4th Ed.

"While an assessment is in one sense a tax, it is a tax of a peculiar nature, differing from a general tax in important characteristics. It is said that an assessment is 'distinguishable from our general idea of a tax but owes its origin to the same source of power.' The chief and most important distinctions between a tax and a local assessment is that a tax is levied for the purpose of raising revenue and paying expenses of the government. The only benefits which the taxpayers receive, they receive as members of organized society. Many of the most valuable of these benefits would inure to them if they were not possessed of any property to be taxed, if, possessing property some of them were able to evade the payment of the tax, they would receive the same benefits as they receive in case of payment. The indi-

vidual taxpayer is, therefore, poorer in a sense by reason of the payment of the tax. The local assessment, on the other hand, does not, in theory at least, leave the property owner who pays his assessment any the poorer by reason of the entire transaction since he is fully compensated by the special benefits conferred upon him by the improvement for the amount of the assessment paid. This distinction between a tax and a local assessment is very generally recognized by the courts. Furthermore, a tax is a recurring charge, while an assessment is levied occasionally only."

1 Page and Jones on Taxation by Assessment, p. 59, Sec. 35, 1909 Ed.

This distinction is concisely stated by a well reasoned decision rendered by the Indiana Supreme Court:

"A distinction should be drawn and observed between the power to levy and collect taxes for general government purposes and the power to make such special assessments. The power to tax for the purpose of raising revenue to administer the affairs of government is the highest sovereign power. The amount of money which a government has power to raise by taxes for such purposes is limited only by the necessities of the government. The government extends to the citizen the protection of its laws, and he enjoys the rights, privileges and immunities of citizenship. One of the highest duties of a citizen is to contribute to the public support of the government under which he lives. Taxes levied for general revenue purposes are not based on the principle of special or peculiar benefit to the individual taxpayer, but are levied for the general benefit and wel-

fare of the nation, state, or municipality. * * * As distinguished from taxes for revenue, special assessments are not levied for the purpose of paying the expense of administering the government of any nation, state, or municipality, but for the purpose of paying the cost and expenses of making a local improvement of a public nature. The amount which can be raised by such assessments for such a purpose is limited by the actual benefits which accrue to the property affected thereby. In theory the benefits which accrue to the general public are paid by the municipality in which the improvement is located, out of its general revenue raised by taxation, while the property which is affected and benefited by the improvement in a manner not common to the public is assessed with the special and peculiar benefits which actually accrue to it as a result of the improvement. The amount so assessed is not regarded as a burden imposed for the support of government; but the theory on which such assessments are sustained is that the property on which they are imposed is increased in value or otherwise peculiarly benefited to an amount equal to the assessment."

Harmon, et al., v. Bolley, et al. (Indiana), 120 N. E. 33, 36; 2 A. L. R. 609, 615.

For a learned and exhaustive consideration of this question, see also

Arnold et al. v. Mayor, etc. of Knoxville, 115 Tenn. 195; 90 S. W. 469; 3 L. R. A. (N. S.) 837.

In an early case the Supreme Court of Washington had occasion to discuss this distinction in the following language:

> "* * * we think the overwhelming weight of authority is that the assessment for benefits in such cases does not fall under the definition of the word 'tax' as used in the constitution—that the word 'tax' has reference to general revenue for the purpose of maintaining and carrying on the government, where the benefits are alike enjoyed by all, and where no special benefits, as in the case of the assessment for improvements, are enjoyed. Of course, the idea of compensation is the basis of all theories of taxation, but an element of special benefits enters into the one, and is the distinguishing feature between taxes and assessments for benefits.
>
> 'Both forms,' says *Desty on Taxation* (Volume 1, p. 4), 'are for public purposes, and both alike burdens on property; the only substantial difference between the two being that general taxation is based upon value, and subject to the constitutional rule of uniformity, while special taxation for benefits is not.'
>
> "The law makes a plain distinction between taxes which are burdens or charges imposed upon persons or property to raise money for public purposes, and assessments for city and village improvements, which are not regarded as burdens, but as an equivalent or compensation for the enhanced value which the property of the person assessed has derived from the improvement."
>
> *Seanor et al. v. Board of Commissioners, et al.*, 13 Wash. 48, 55; 42 Pac. 552, 555.

The failure of the Supreme Court of the State of Washington to take cognizance of and apply the universally recognized distinction made by the foregoing authorities is the first and fundamental error in its treatment of the problem herein presented.

II.

THAT THE LEVY MADE BY THE DIRECTORS OF AN IRRIGATION DISTRICT IS A SPECIAL ASSESSMENT FOR A LOCAL IMPROVEMENT AND IS GOVERNED BY THE RULES OF LAW RELATING THERETO.

In the light of this distinction between a tax and an assessment, it is necessary to inquire into the nature of the assessment levied by an irrigation district, organized under the laws of the State of Washington, and determine whether it is a special assessment or a general tax.

A. The Legal Status of an Irrigation District.

For the purpose of suing and being sued and with respect to its authorized contracts, irrigation districts have been treated as municipal corporations, in the sense that they are public corporations having a separate legal entity.

Peters et al. v. Union Cap Irrigation District, 98 Wash. 412; 167 Pac. 1085.

State ex rel. Clancy v. Columbia Irrigation District of Stevens County, 121 Wash. 79; 208 Pac. 27.

In holding that an irrigation district is not a municipal corporation exercising governmental functions, the Supreme Court of the State of Washington said:

> "* * * The powers conferred upon these irrigation districts are not primarily that of government or regulation, or even of taxation, though such are conferred to a limited degree as necessarily incident to the main power conferred. The primary and main power thus conferred is that of local improvement of the real estate therein for the benefit of its owners, and at their expense. In one sense, the district thus constituted is not a public corporation at all; its object has no connection with any of the public duties which the state owes to its inhabitants. In a certain sense, it is only the purely private interest of the freeholders that is sought to be subserved.
>
> "If, in the absence of constitutional provisions prohibiting special legislation, the legislators saw fit to provide that the farms of three adjoining proprietors should be improved by the erection of a dike or the excavation of a ditch upon certain conditions therein provided, we do not think it would be claimed that the three farms and their owners were by said act constituted a public corporation, and we are certain that such legislation would not create a municipal corporation, in any sense whatever. The act in question is of substantially the same

kind as would be such special act. It is true that it may be extended throughout a large area, and affect the rights of a large number of people, but it must be remembered that it does not affect their rights in the way that ordinary municipal corporations do. They pay taxes, it is true, or an assessment in the nature of a tax, *but it is not for the benefit of the community at large within such districts, but for the special benefit of the owners of real estate situated therein, and it is proportioned to the benefits which they are to receive from the improvement.* In a certain sense, no tax in the ordinary use of that word is imposed; each owner of land contributes to a common fund, and receives back from such fund the exact amount of his contribution. Such is not the nature of a tax levied in any of the corporations which have been held to be municipal corporations. In those, every taxpayer must pay his taxes according to the value of his property, regardless of the question as to whether or not his property is directly benefited thereby." (Italics ours.)

Board of Directors of the Middle Kittitas Irrigation District v. Peterson, 4 Wash. 147, 152; 29 Pac. 995, 996.

Some years later, the Supreme Court of the State of Washington had occasion to consider whether an irrigation district was a municipal corporation so as to preclude it from including territory already within the boundaries of another irrigation district. In holding that it was not a munici-

pal corporation, when considered in that sense, the Court used the following language:

> "* * * We may concede this to be a sound general rule applicable to pure municipal corporations whose functions are purely governmental, and whose revenues in aid of such functions are exacted in the form of general taxes upon private properties within the territorial limits of such corporation without regard to the apportioning of such taxes according to any special benefits flowing to such private properties. These irrigation districts are not such municipal corporations. Indeed, while they are in form public or quasi municipal corporations, in the sense that they have a legal entity, and have an organized local government for the purpose of functioning within their very narrow limited powers which can at most be said to be governmental only in the most limited sense, they are, for the purpose of raising revenue to construct their respective irrigation systems, procure water, and furnish the same to lands within their respective boundaries, little else than local improvement districts whose revenues can be exacted by the burdening of properties within their boundaries only in proportion to the benefits accruing from such works and service to such properties. * * *
>
> "By further provisions of that section, and some others following, the method of levying such assessments is prescribed, which includes an opportunity on the part of the owners of the property sought to be assessed to be heard before a final determination and apportionment of the amount of such assessments against the several benefited private properties within the district; all much like the usual levying

of special assessments for local improvements. We find nothing in the statute as it now exists, or has existed since 1915, conferring upon irrigation districts any general power of taxation apart from the consideration of benefits."

In re Riverside Irrigation District, 129 Wash. 627, 629; 225 Pac. 636, 637.

The language of the court in this case was modified in a rehearing in which they indicated that they did not intend to place it in the same class as a special improvement district. The court said:

"That part of the Departmental opinion which likens an irrigation district to a local improvement district contains language which we now hold may be discarded. An irrigation district is purely a creature of statute, and has the powers which the statutes confer directly or by necessary implication, and no others; but it is a legal entity that has full authority to exercise all of the powers which the statutes so confer."

In re Riverside Irrigation District, 131 Wash. 532, 533; 230 Pac. 649, 650.

It will be noted that this apparent modification specifically recognizes the limitation of the powers of an irrigation district to those expressly conferred by statute. These powers are enumerated in a section of the Code (Appendix ii.) and it has never been contended or held by the Washington

Supreme Court that these statutory powers included the exercise of governmental functions or the concomitant power of levying a general tax.

In a later case, the Supreme Court of Washington quotes with approval from *In re Riverside Irrigation District,* 129 Wash. 627; 225 Pac. 636, and summarizes its decisions on the question of the status of an irrigation district and comes definitely to the conclusion that as that term is used in our constitution, an irrigation district is not a municipal corporation, exercising governmental functions or having the power to levy general taxes.

> *Columbia Irrigation District v. Benton County, et al.,* 149 Wash. 234; 270 Pac. 813.

The Supreme Court of the State of Washington held also that assessments by an irrigation district must be made according to benefits, and that an assessment upon an ad valorem basis is absolutely void:

> *Union Trust Company as Executor v. Carnhope Irrigation District, et al.* 132 Wash. 538; 232 Pac. 341; 234 Pac. 277 (on rehearing).

In the case last cited, the State Supreme Court further held that the amount of individual benefits

is to be determined by the increase in the market value of the property affected. On page 549 in 132 Wash. and page 345 in 232 Pac.:

> "* * * This price or value is to be determined as it was before the improvement was in, and as it is after the improvement has been constructed. The increase, if any, which the improvement has made in this value is the limit of the benefit which that property has acquired by reason of the improvement."

And the Court notes that while many elements are taken into consideration in arriving at the amount of this increase, the benefit is measured by the increase only, and cites to that effect, on page 541 in 132 Wash. and page 342 in 232 Pac., its own decision in *Otis Orchards Company v. Otis Orchards Irrigation District No. 1,* 124 Wash. 510; 215 Pac. 23.

A review of the Washington cases clearly demonstrates that while for certain purposes irrigation districts are treated as municipal corporations, i. e., as public corporations having a separate legal entity, yet when considering their power of taxation, they have always been treated as having the power of special assessment only. It has never been held that they have the general power of taxation or that they exercise any general governmental functions.

In *Kadow et al. v. Paul et al.*, 134 Wash. 539, 553; 236 Pac. 90, 95, the State Supreme Court said:

> "* * * Diking districts as well as irrigation districts are public improvements. The cost in each is to be assessed against the property benefited."

B. Irrigation Assessments Must Be Special Assessments Under the Constitution of the State of Washington.

The foregoing should be conclusive of the question under consideration, but in view of the fact that the very basis of the Appellant's contention is that an irrigation district has only the power of special assessment, we feel obliged to extend the discussion further and point out, first, that the theory that irrigation assessments are special assessments is the only theory on which their levy can be justified under the Constitution of the State of Washington, and second, that, in other states having irrigation district statutes, the courts have, with unanimity, classified them as special assessments.

The Supreme Court of Washington has held that the Legislature may confer the power to levy special assessments on a public corporation, such as diking districts.

Hansen et al. v. Hammer, 15 Wash. 315; 46 Pac. 332.

Amendment 14 to the Constitution of the State of Washington* requires all real property in one taxing unit to be uniformly taxed for public purposes only, i. e., proportionately and according to value. (Appendix xiii.) Irrigation district assessments, by virtue of Section 7436 of Remington's Revised Statutes of Washington, must be made according to benefits. (Appendix vi.) How, then, can the levy of an irrigation district be justified? Only on the theory that it is a special assessment and not subject to the constitutional provisions applicable to general taxes.

It is well settled that the constitutional requirement of uniformity does not apply to special assessments.

25 R. C. L., p. 90, and cases cited therein, and in the Supplements thereto.

As applied to irrigation assessments, we find the Oregon Supreme Court saying:

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*This Amendment strikes out Sections 1, 2, 3, and 4 of Article VII of the Constitution of the State of Washington, but at the same time re-enacts the material portions thereof relevant herein. (Appendix xiv.)

> "* * * This restriction contained in the Oregon constitution has no relation to special assessments for benefits to property. It relates to taxation for governmental purposes."
>
> *Northern Pacific Railway Company et al. v. John Day Irrigation District, et al.* (Oregon), 211 Pac. 781, 784.

That, it is submitted, would be the only answer that could be made to a contention that the Washington irrigation statute is unconstitutional in that it does not require assessments to be made according to value.

On the other hand, special assessments can be levied against the property benefited, which, in this case, is the real property owned.

> 25 R. C. L. p. 108, and the cases cited therein and in the Supplements thereto.

Amendment 14 to the Constitution of the State of Washington (Appendix xiii.) provides that the property of counties, cities and other municipal corporations shall be exempt from taxation. Yet the State Supreme Court has said that real property acquired by a county is subject to irrigation district assessments.

> *State ex rel. Clancy v. Columbia Irrigation District of Stevens County,* 121 Wash. 79; 208 Pac. 27.

This conclusion can be justified only on the theory that the assessment levied by an irrigation district is a special assessment and not a general tax, and for that reason the provision in the Washington constitution is inapplicable.

This identical question was decided in the same manner by the Supreme Court of California in construing the irrigation laws of that state, after which those of Washington are modelled. The California constitution exempted the property of the "state, or any county, or municipal corporation" from taxation. The California Supreme Court, in holding that property owned by a municipality within an irrigation district was liable for irrigation district assessments said:

> "* * * But the assessment to satisfy which the lands in question were sold is not a tax, within the meaning of said provision of the constitution. * * * The district, when formed, is a local organization, to secure a local benefit, to be derived from the irrigation of lands from the same source of water supply, and by the same system of works. It is, therefore, a charge upon the lands benefited, or capable of being benefited, by a single local work or improvement, and from which the state, or the public at large, derives no direct benefit, but only that reflex benefit which all local improvements confer."

City of San Diego v. Linda Vista Irrigation District, et al., 108 Cal. 189; 41 Pac. 291, 292; 35 L. R. A. 33, 38.

Section 9 of Article VII of the Constitution of the State of Washington (Appendix x.) reads as follows:

> "The legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of property benefited. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same."

By virtue of the second part of this section, the legislature may authorize municial corporations to assess and collect *taxes* for all corporate purposes providing such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same But taxes in proportion to benefits clearly would not be uniform in respect to persons and property.

On the other hand, the first part of this section clearly authorizes special assessments in proportion to benefits. This section of the Constitution is of particular importance in that it recognizes the

distinction between taxes and assessments and defines the basis on which each should be levied.

Again, in Section 6 of Article VIII of the Constitution of the State of Washington (Appendix xii.), we find a provision limiting the indebtedness of a county, city or other municipal corporation. The obvious policy of this provision was to prevent counties, cities and other political subdivisions from incurring unlimited indebtedness collectible from property owners in the form of general taxation. The Washington Supreme Court, in interpreting this section of the Constitution, holds that irrigation districts are not municipal corporations exercising general governmental functions and the concomitant power of general taxation, but that the obligations incurred by an irrigation district are to be paid by the collection of special assessments from the property benefited.

> *Board of Directors of the Middle Kittitas Irrigation District v. Peterson*, 4 Wash. 147; 29 Pac. 995.

It is hardly consistent to now contend that irrigation districts are municipal corporations and have the power of general taxation to meet the indebtedness incurred by them.

Thus we see that the theory of irrigation assessments being special assessments is consistent with the provisions of the Constitution of the State of Washington, while the theory that the levy of an irrigation district is a general tax is entirely inconsistent therewith.

Particular attention is called to the case of *Board of Directors of the Middle Kittitas Irrigation District v. Peterson,* 4 Wash. 147; 29 Pac. 995, which clearly defines the nature of an irrigation district under the laws of the State of Washington, and applies those fundamental legal conceptions which at once establish and limit the powers of taxation granted to an irrigation district by statute.

C. Decisions of Courts of Other States Having Irrigation Districts.

On reviewing the decisions of the courts of other states having irrigation district statutes, we find unanimous concurrence of authorities to the effect that irrigation district assessments are special assessments.

Assessments by an irrigation district are special assessments.

Nelson v. Board of Commissioners of Davis County, et al. (Utah), 218 Pac. 952.

The Supreme Court of Nevada says:

"Counsel fail to distinguish between the phrases 'assessment of benefits' and 'special assessments' to be charged or levied against the land within the district, and the term 'tax,' as ordinarily used in revenue laws. It is the plan of assessment of benefits and special assessment of benefits required to be carefully ascertained and equitably and fairly apportioned or distributed to the lands within the district as nearly as can be, that appeals to us as commending the act as a wise public policy. * * *

"* * * There is a wide difference in law between a tax and an assessment. In the one case the taxes are assessed against the individual and become a charge upon his property generally. In the other, the assessment, being for the benefits accruing to the specific property, becomes a charge only upon and against it, and liability for the charge is confined to the particular property benefited. Therefore an assessment or special assessment is not embraced within the meaning of the word 'taxation' because the owner of the property assessed gets back the amount of his assessment in the benefits received by his property and therefore does not bear the burden of a tax."

In re Walker River Irrigation District, 44 Nev. 321; 195 Pac. 327, 330.

The Supreme Court of Wyoming, in considering the status of irrigation districts and considering the nature of the levy made by them, said:

"* * * They are merely special state organizations for state purposes with limited

powers, created to perform certain work which the policy of the state requires or permits to be done, and to which the state has given a certain degree of discretion in reclaiming desert lands. *In re Bonds of Orosi Public Utility District* (Cal. Sup), 235 Pac. 1004; *Thaanum v. Irrigation District*, 72 Mont. 221; 232 Pac. 528; *People v. Sacramento Drainage District*, 155 Cal. 373, 382; 103 Pac. 207; *Reclamation District, etc., v. County of Sacramento*, 134 Cal. 477; 66 Pac. 668. Nor are they subdivisions of any city, town, village, or county in the state. * * *

"* * * The exactions authorized to be made by such districts may in a broad sense, be termed taxes, but they are distinguishable therefrom, for they are levied for local benefits to be spread on the property in the districts in proportion to the peculiar advantages accruing to each parcel therein from the improvement made. Whether in the form of special assessments or in the form of taxes, they are essentially assessments for local benefits, and not levied for general governmental purposes, as are the taxes contemplated in the constitutional provisions mentioned and referred to in the statement of facts."

Sullivan v. Blakesley et al., 35 Wyo. 73; 246 Pac. 918, 922.

The levy of an irrigation district under Colorado laws is a special assessment.

Henrylyn Irrigation District et al. v. Thomas, 66 Colo. 296; 181 Pac. 979.

So also in Montana:

Thaanum v. Bynum Irrigation District et al., 72 Mont. 221; 232 Pac. 528.

And in Idaho:

"The Idaho Irrigation District Law, since its enactment, in 1898, has been frequently amended and modified to make it more applicable to existing conditions, but it has always recognized as a basic principle of the law that the assessments levied by virtue of its provisions differ from a general tax levied for governmental purposes in the important particular that such assessments can only be levied upon the basis of benefits."

American Falls Reservoir District et al. v. Thrall et al., 39 Ida. 105; 228 Pac. 236, 248.

Assessments levied by a reclamation district are local improvement assessments:

Hagar v. Reclamation District No. 108, 111 U. S. 701; 28 L. Ed. 569; 4 Sup. Ct. 663.

In the case af *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112; 17 Sup. Ct. 56; 41 L. Ed. 369, it was the assumption of the court that the assessments of an irrigation district were local improvement assessments. On page 176 in 164 U. S.:

"Although there is a marked distinction between an assessment for a local improvement and the levy of a general tax, yet the former is

> still the exercise of the same power as the latter, * * * *. Assume that the only theory of these assessments for local improvements upon which they can stand is that they are imposed on account of the benefits received and that no land ought in justice to be assessed for a greater sum than the benefits received by it, yet it is plain that the fact of the amount of benefits is not susceptible of that accurate determination which appertains to a demonstration in geometry."

The Supreme Court of California declared itself bound by the assumption so made in the case of *Fallbrook Irrigation District v. Bradley, supra.* In the course of its opinion it said:

> "The only difficulty in applying the decisions on this subject is to determine whether or not the district created by the subordinate body in pursuance of an act of the Legislature is in its nature a public corporation, the inhabitants and property owners of which are subject to taxation for municipal purposes without any hearing as to the benefits to be derived from the creation and conduct of such a corporation, or is an assessment district created for the primary purpose of assessing upon private lands the benefits to be derived thereby from the public improvements for the purpose the district is formed.
>
> "In the present case, however, we are not subject to any embarassment in such application because that question has been conclusively determined by the Supreme Court of the United States in its holding that an irrigation district organized under the Wright law is such

a district as could only be properly formed by notice to the property owners at some stage of the proceedings of the inclusion of their lands within the district and by giving them a hearing before some tribunal having power to decide the matter, in advance, and, if possible, sustain their contention that their lands would not be benefited by the proposed improvement."

Miller & Lux, Inc., v. Board of Supervisors of Madera County et al., 189 Cal. 254; 208 Pac. 304, 310.

Considering the nature of the levy of an irrigation district as established by the foregoing citations, it would seem that we are justified in predicating our contention on the theory that the levy made by an irrigation district in the State of Washington is a special assessment.

III.

THAT AN ASSESSMENT AGAINST A PARTICULAR PIECE OF LAND FOR LOCAL IMPROVEMENTS IN SUBSTANTIAL EXCESS OF THE BENEFITS ACCRUING TO THAT PARTICULAR LAND BY REASON OF THE IMPROVEMENTS CONSTITUTES A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Since the levy made by an irrigation district is a special assessment for a local improvement,

the nature and extent of the power and the manner of its exercise is to be governed by the rules of law governing the power to levy special assessments.

A. Theory Upon Which Special Assessment Levies Is Founded.

In considering the nature and extent of this power, the first matter of inquiry is the theory on which it is founded. This theory is ably set forth in the text books of three well known writers.

> "The foundation of the power to lay a special assessment or a special tax for a local improvement of any character, whether it be opening, improving or paving a sidewalk or street, or constructing a sewer, or cleaning or sprinkling a street, is the benefit which the object of the assessment or tax confers on the owner of the abutting property, or the owners of property in the assessment or special taxation district which is different from the general benefit which the owners enjoy in common with the other inhabitants or citizens of the municipal corporation. 'The whole theory of local taxation or assessments is that the improvements for which they are levied afford a remuneration in the way of benefits. A law which would attempt to make one person, or a given number of persons, under the guise of local assessments, pay a general revenue for the public at large would not be an exercise of the taxing power, but an act of confiscation. In effect it would be transferring the property of one individual to another. These are legal

truisms which have been long entertained and firmly established.'"

5 McQuillin on Municipal Corporations, p. 4329, Sec. 2018, 1913 Ed.

"The theory underlying the doctrine of local assessments of the first type (local improvement) which is held by the great majority of the courts, is that the value of certain property is enhanced by improvement of a public character, the property thus receiving a special and peculiar benefit; that upon such property a part or a whole of the cost of such public improvement is assessed to an amount not exceeding the amount of such benefits. The owner of the property is therefore under this theory no poorer by reason of the entire transaction, as the assessment only takes from him the equivalent, or part, or all of the public benefit which the public improvement has conferred upon him; or to state it another way, the special benefits conferred upon him by the public improvement compensate him or more than compensate him for the amount of the assessment which he is obliged to pay."

1 Page and Jones on Taxation by Assessment, p. 16, Sec. 11, 1909 Ed.

"A special assessment is in the nature of a tax upon property levied according to benefits conferred upon the property. The whole theory of a special assessment is based on the doctrine that the property against which it is levied derives some special benefit from the improvements. The justice of demanding the special contribution is supposed to be evidenced in the

> fact that the parties who are to make it, while they are to bear the cost of the public work, are at the same time to suffer no pecuniary loss thereby, their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay."
>
> *1 Cooley on Taxation,* pp. 105-6, Sec. 31, 4th Ed.

Ordinarily, property of like kind and quality and similarly situated within the same political subdivision must be taxed at a uniform rate. An act of legislature, which would tax one piece of property in a certain political subdivision at a rate different from that imposed on a neighboring piece of property of the same kind and quality in the same political subdivision, would be unconstitutional by reason of the fact that it would deprive the person of property without due process of law and would deny him the equal protection of the laws.

> *Hopkins, Assessor, et al., v. Southern California Telephone Co. et al.,* 275 U. S. 393; 72 L. Ed. 329; 48 Sup. Ct. 180.
>
> *Sioux City Bridge Co. v. Dakota County,* 260 U. S. 441; 67 L. Ed. 340; 43 Sup. Ct. 190; 28 A. L. R. 979.

An exception to this rule, or not coming within its operation, is where property receives a special

or peculiar benefit from a public improvement. Where such is the case, it may be taxed for the purpose of paying the cost of that improvement and the fact that it is taxed at a rate different from other property of like kind and quality in the same political subdivision is justified on the ground that it is specially benefited.

Hagar v. Reclamation District No. 108, 111 U. S. 701; 28 L. Ed. 569; 4 Sup. Ct. 664.

Fallbrook Irrigation District v. Bradley, 164 U. S. 112; 41 L. Ed. 369; 17 Sup. Ct. 56.

Norwood v. Baker, 172 U. S. 269; 19 Sup. Ct. 187; 43 L. Ed. 443.

Board of Directors of the Middle Kittitas Irrigation District v. Peterson, 4 Wash. 147; 29 Pac. 995.

B. Maximum Amount of Special Assessment Levy Limited to Maximum Benefit Conferred on Land Assessed.

Since the levy of any special assessment is justified only on the theory of special benefit, it necessarily follows that the maximum amount of such a levy is limited to the maximum benefit conferred on the land assessed, and a levy in excess thereof constitutes a taking of property without due process of law.

The practice of levying special assessments, while infrequently employed in the early history of our country, became more and more prevalent as the advantages of this method of financing public improvements became manifest. Land for parks was acquired and improved, streets and sidewalks paved, swamps drained, dikes erected, irrigation systems developed, and even railroad tunnels constructed and the cost thereof imposed on the land benefited. Generally, the courts upheld the action of the legislature where the improvement was public in its nature and where the cost was apportioned in accordance with and limited to benefits. However, the very nature of the power suggested the possibilities of its abuse. Reason alone indicated that there must be some limitation and it was the action of a small town in Ohio which gave rise to a case which definitely and conclusively prescribed the limitations of that power.

The Ohio statutes permitted lands to be condemned for highways and streets and permitted the cost to be put on the general tax list or in proportion to the benefits derived from the improvements or by value of the front foot on abutting properties. The city proceeded to condemn a strip of land through the plaintiff's property. The plaintiff's land was

the only property abutting on this street that was condemned. The sum of $2,000 was awarded and paid to the plaintiff. The city concil then proceeded to levy an assessment for the cost of condemning the land in accordance with a front foot rule. In view of the fact that the plaintiff's land was the only land abutting on this street, the assessment applied only to him. The owner contested the validity of this assessment on the theory that it was an attempt to deprive him of property without due process of law. In upholding his contention, this Court said:

> "In our judgment the exaction from the owner of private property of the cost of public improvement in substantial excess of the special benefits accruing to him, is, *to the extent of such excess,* a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess' because exact equality of taxation is not always obtainable and, for that reason, the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment." (Italics ours.)
>
> *Norwood v. Baker,* 172 U. S. 269, 279; 19 Sup. Ct. 187; 43 L. Ed. 443.

This case has been cited and applied many times for the principle it states, and, while held inap-

plicable to the facts presented in certain cases, the Supreme Court of the United States has never indicated any limitation on the principle therein announced nor modified the language employed. The principle of *Norwood v. Baker, supra,* has been applied by this Court in the following cases:

Gast Realty and Investment Co. v. Schneider Granite Co., 240 U. S. 55; 60 L. Ed. 523; 36 Sup. Ct. 254.

Martin v. District of Columbia, 205 U. S. 135; 51 L. Ed. 743; 27 Sup. Ct. 440.

Hagar v. Reclamation District No. 108, 111 U. S. 701; 28 L. Ed. 569; 4 Sup. Ct. 663.

Myles Salt Co. Inc. v. Board of Commissioners of the Iberia & St. Mary Drainage District, 239 U. S. 478; 60 L. Ed. 392; 36 Sup. Ct. 204; L. R. A. 1918 E. 190.

Phillip Wagner, Incorporated, v. Leser et al., 239 U. S. 207; 60 L. Ed. 230; 36 Sup. Ct. 66.

The line of thought running throughout all of these cases is that the State Legislature has a wide discretion in apportioning the costs of improvements on the lands benefited, or establishing a rule whereby they may be apportioned by a public body to whom that function is delegated, and, unless the deter-

mination so made or the rule prescribed is unjust and arbitrary, the method of apportioning the costs will be conclusive, so long as the assessment apportioned against any particular piece of land is not in substantial excess of the benefits conferred thereon. The results of the various decisions are summarized by McQuillin in his book on Municipal Corporations:

> "The rule that a method of assessment cannot be arbitrary and must have some relation to the benefits appears reasonable. It would seem that the legislature is competent to judge of the benefits. This is assumed by the current of authority. A public improvement having been made, the question of determining the area benefited by such improvement is generally held to be a legislative function and such legislative determination, unless palpably unjust, is usually conclusive. *The prohibition is that assessments shall not be levied in excess of the benefits conferred whether by the valuation, front foot, area, or any other method.*" (Italics ours.)
>
> 5 *McQuillin on Municipal Corporations*, p. 4331, Sec. 2018, 1913 Ed.

The results of the decisions are summarized by another author in the following language:

> "In theory at least it is held in the great majority of jurisdictions that an assessment must be apportioned according to the benefits

conferred by the improvement for which such assessment is levied, *and must not in any case be in substantial excess of such benefits.* As has already been said, the courts are not in harmony as to the constitutional principle which is applicable in limiting assessments to benefits conferred. The great weight of authority, however, is that which forbids taking of property without due process of law. If the assessment does not exceed the amount of benefits conferred by the improvement for which such assessment is levied and is apportioned according to such benefits, it is not objectionable as a violation of the constitutional provision under discussion. If the assessment is not apportioned in substantially the same ratio as the benefits, *or if it is substantially in excess thereof, such assessment is invalid as amounting to a taking of property without due process of law.*" (Italics ours.)

1 Page and Jones on Taxation by Assessment, p. 197, Sec. 118, 1909 Ed.

A review of the cases decided in the various states reveals the fact that they have almost without exception followed the rule laid down in *Norwood v. Baker,* 172 U. S. 269; 19 Sup. Ct. 187; 43 L. Ed. 443.

Iowa Pipe & Tile Co. v. Callahan, 125 Iowa 358; 101 N. W. 141; 106 A. S. R. 311; 3 Ann. Cas. 7; 67 L. R. A. 408.

Sears v. Board of Aldermen of Boston et al., 173 Mass. 71; 53 N. E. 138; 43 L. R. A. 834.

Corcoran et al. v. Board of Aldermen of Cambridge, et al., 199 Mass. 5; 85 N. E. 155; 18 L. R. A. (N. S.) 187.

Power v. City of Helena, 43 Mont. 336; 116 Pac. 415; 36 L. R. A. (N. S.) 39.

Tidewater Co. v. Coster, 18 N. J. Eq. 518; 90 Am. Dec. 634.

The Washington Court itself, in line with the great majority of the state courts, has cited *Norwood v. Baker, supra,* and adopted the principles of law therein set forth. In considering the power of the county commissioners to assess for drainage purposes, the court said:

> "Both by the statute under which the commissioners acted and by the fundamental law, the commissioners were without power to assess against the land a greater sum than the amount of the benefits the improvement conferred upon them."

State ex rel. Espy Estate v. Board of Commissioners of Pacific County, 48 Wash. 230, 232; 93 Pac. 326, 327.

In another case involving the validity of drainage assessments, this principle of law was recognized and applied. The Washington drainage statute provides for an ascertainment of maximum benefits. An attempt was made to levy an assessment in ex-

cess of the benefits. In holding that the commissioners had no such power, the court said:

> " * * * However, we are of the opinion that the act does not contemplate a reascertainment or a subsequent fixing of the amount of the benefits accruing to the property by reason of the original construction of the improvement; but that it merely confers upon the district the right to make supplemental assessments to pay for the cost of constructing the original improvement, provided the amount of the deficiency plus the amount of the assessment made in the original proceeding, does not exceed the amount of the maximum benefits as originally fixed and determined by the jury. * * *
>
> "This construction of the statute must be preferred in view of the well settled canon of construction that, where a statute is open to two constructions, one of which will render it constitutional, the other of which will render it unconstitutional, the former and not the latter is the construction to be adopted."

Poolman et al. v. Langdon et al., 94 Wash. 448, 457; 162 Pac. 578, 581.

In a similar case the appellants contended that the power of reassessment deprived them of property without due process of law. The Court said:

> " * * * When it comes to charging the cost of the improvement against the several tracts of land within the district, such charge must be 'in proportion to the benefits accruing thereto,'

and we think that statute also means that no tract of land can be charged in excess of the benefits accruing thereto."

Foster v. Commissioners of Cowlitz County et al., 100 Wash. 502, 512; 171 Pac. 539, 542.

In another Washington case the question was raised as to whether property within a waterway district was liable to assessment in an amount in excess of the maximum benefits. In that case we find the Washington Supreme Court saying:

"Keeping in mind, then, that the expense and cost of all public works may be charged to property benefited, it is fundamental that no greater charge can be made than a sum equal to the benefits received; for, if a charge be made over and above the benefit to the property, it is a taking of property without just compensation and violates Article I, Section 16, of the Bill of Rights."

Behrens v. Commercial Waterway District No. 1 of King County, 107 Wash. 155, 157; 181 Pac. 892, 893.

Again, in a very recent case, this same principle was announced:

"It is fundamental that no greater exaction can be made than a sum equal to the benefits received; for, if a charge be made over and above the benefits to the property, it is the taking of property without just compensation

and violates Article 1, Section 16, Washington Constitution."

Perkins & Co. v. Diking District No. 3 of Island County et al., 162 Wash. 227, 233; 298 Pac. 462, 464.

See also:

Boyd et al. v. Cunningham et al., 164 Wash. 335; 2 Pac. (2d) 647.

That these decisions are pertinent to a discussion of the irrigation district law of the State of Washington is shown by the following declaration from the case of the *Board of Directors of Modesto Irrigation District v. Tregea,* 88 Cal. 334; 26 Pac. 237, quoted with approval by this Court in the case of *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112, 173; 41 L. Ed. 369; 17 Sup. Ct. 56:

> " 'The formation of irrigation districts is accomplished by proceedings so closely analogous to those prescribed for the formation of swamp-land reclamation districts that the decisions with respect to the latter are authority as to the former, * * *.' "

The foregoing citations serve to illustrate how generally the principle announced in *Norwood v. Baker,* 172 U. S. 269; 19 Sup. Ct. 187; 43 L. Ed. 443, has been recognized and applied. Further, au-

thority is not lacking with respect to its application to irrigation district assessments.

The Colorado court, in considering the rights of the Board of Directors of an irrigation district to levy an amount to cover the delinquencies arising on other lands, said:

> "* * * To hold that one owner is liable for the assessments due for benefits conferred upon the land of his neighbor would be violative of both State and Federal constitutions, and for this reason alone the argument against the contention of Plaintiff should be conclusive. A construction of this act which charges the property of a faithful few with the payment of the entire cost of the project is manifestly contrary to the purpose and spirit of the act and cannot be legally upheld on any theory. Such a rule would be fundamentally wrong, and subversive of every legal principle governing assessments for local improvements."
>
> *Interstate Trust Co. v. Montezuma Valley Irrigation District et al.*, 66 Colo. 219; 181 Pac. 123, 125.

The Nebraska court, in considering the power of an irrigation district to levy assessments against property not benefited, said:

> "An irrigation district is a public corporation, but not a municipal corporation. * * * Unless it is clearly shown or indisputedly established that the result of its action will exact

from the owner of private property within the district a sum in substantial excess of the special benefits accruing to him, he is not entitled to complain. To quote from *Norwood v. Baker,* 172 U. S. 269; 19 Sup. Ct. 187; 43 L. Ed. 443:

> 'We say "substantial excess" because exact equality of taxation is not always obtainable and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment.'
>
> '"* * * but it must be remembered that the assessments made upon the property in the district, although made by valuation, and not by acreage, foot frontage, or other rule, are special assessments, and must be levied upon the real estate in proportion to the special benefits received."

Erickson v. Nine Mile Irrigation District et al., 109 Neb. 189; 190 N. W. 573, 575.

Of special significance is a recent decision of the Supreme Court of Montana. In 1925 the Montana Supreme Court in the case of *Cosman v. Chestnut Valley Irrigation District et al.,* 74 Mont. 111; 238 Pac. 879; 40 A. L. R. 1344, held that bonds issued by the district were the general obligation of the district and that there was no limit to the liability of the lands in the district. After a number of years of sad experience with the vicious

effect of this principle, a case was recently submitted to that court in which it was contended that under the principle announced in *Norwood v. Baker, supra,* the rule previously followed by that court with respect to irrigation district assessments was unconstitutional and should be overruled.

The court lent its ear to this contention and after considering the true nature of the levy made by an irrigation district, expressly overruled its earlier decision. The following language of the court is quoted:

> "The impositions imposed upon the lands within an irrigation district for the purpose of irrigating the lands therein are special assessments. * * *
>
> "* * * The theory upon which assessments may be levied for special improvements is 'that the property assessed will be enhanced (in value) to the extent of the burden imposed.' * * *
>
> "If the sole justification for placing an additional burden upon a given tract of land is the benefits accruing to that tract of land, then it must follow that any exaction from the owner of that land of any amount substantially exceeding the value of such benefits is to that extent the taking of private property for an alleged public use without compensation. * * *"
>
> *State ex rel. Mallott v. Board of Commissioners of Cascade County et al.,* (Mont.) 296 Pac. 1, 14,

and on page 18:

> "We are satisfied that the rule heretofore announced by this court to the effect that bonds issued by an irrigation district constitute general obligations of that district is erroneous. We are further satisfied that less injury will result from overruling rather than following the doctrine as last above announced; and therefore, the former holding of this court to the effect that such bonds constitute general obligations is overruled. It follows that the lien of the bonds is extinguished by the tax deed to the county, and that the purchaser from the county takes title free and clear of the lien of the bonds. Further, that the bonds are not general obligations of the irrigation district, but are a charge against the lands within the district, and that delinquent assessments for the payment of the bonds and interest may not be included in future assessments made against the other lands of the district."

The action of the Supreme Court of Montana is of special significance, not only as a correct statement of the law, but also as a judicial recognition that as a matter of fact less injury will result from a limited liability theory than from an unlimited liability theory.

It can be seen from the foregoing that the principle of *Norwood v. Baker*, 172 U. S. 269; 19 Sup. Ct. 187; 43 L. Ed. 443, has been given universal application, although the Supreme Court of the

State of Washington has cited the following cases as holding to the contrary:

> *Cosman v. Chestnut Valley Irrigation District et al.*, 74 Mont. 111; 238 Pac. 879; 40 A. L. R. 1344.
>
> *Stevens et al. v. Melville et al.*, 52 Utah 524; 175 Pac. 602.
>
> *Norris et al. v. Montezuma Valley Irrigation District et al.*, 248 Fed. 369.

A cursory reading of the opinions in these cases demonstrates that they do not in fact do so.

Cosman v. Chestnut Valley Irrigation District et al., 74 Mont. 111; 238 Pac. 879; 40 A. L. R. 1344, has since been overruled by *State ex rel. Mallott v. Board of County Commissioners*, 89 Mont. 37; 296 Pac. 1, upon the authority of *Norwood v. Baker*, 172 U. S. 269; 19 Sup. Ct. 187; 43 L. Ed. 443, and the constitutional grounds urged by the Appellant herein.

The case of *Stevens et al. v. Melville et al.*, 52 Utah 524, 175 Pac. 602, was an action to confirm proceedings incident to the organization of an irrigation district and the issuance of bonds subsequent thereto. It was held that the provisions of the Utah statute authorizing a levy for anticipated defaults were constitutional. On that question the

decision of the court went no further. In a later case brought by an individual landowner, for the purpose of preventing a threatened levy, the Utah Supreme Court pointed out that the Utah Legislature had incorporated the theory of limited liability in the statutes:

> "Moreover, the general spirit of the entire Act seems to negative the claim or argument that it was intended by the Legislature that the indebtedness should be an obligation chargeable against all of the property in the district, as a general municipal liability."
>
> *Nelson v. Board of Commissioners of Davis County et al.,* (Utah) 218 Pac. 952, 953.

For this reason the Utah Supreme Court can hardly be quoted as having held contrary to the general principles of law laid down in *Norwood v. Baker,* 172 U. S. 169; 19 Sup. Ct. 187; 43 L. Ed. 443.

The case of *Norris et al. v. Montezuma Valley Irrigation District,* 248 Fed. 369, arose in the District Court for Colorado, reported in 240 Fed. 825, and the trial court, in its opinion, held that the liability of lands within an irrigation district was limited to the benefits conferred thereon. The Circuit Court of Appeals, as reported in 248 Fed. 369, reversed the holding of the District Court by a two to one decision. However, the majority opinion

points out that this was a controversy between the bondholders and the District, and that the rights of an individual landowner in the District were not raised.

On page 373:

> "* * * The objection is not made by any taxpayer claiming to have paid his full share of the prior levy, but is made by the Defendants in error, the Irrigation District, the Board of County Commissioners, and the County Treasurer."

In considering the holding of the Circuit Court of Appeals in said case, attention should be directed to the logic of the dissenting opinion of District Judge Amidon, in 248 Fed. 369, 375, and the fact that the Colorado Supreme Court, about one year later, held in accordance with the reasoning of and conclusions in said dissenting opinion.

> *Inter-State Trust Company v. Montezuma Valley Irrigation District et al.*, 66 Col. 219; 181 Pac. 123.

In *Kadow et al. v. Paul et al.*, 274 U. S. 175, 181; 71 L. Ed. 982; 47 Sup. Ct. 561, this Court recognized the limitations to be placed upon the opinion of the Circuit Court of Appeals in *Norris et al. v. Montezuma Valley Irrigation District et al.*, 248

Fed. 369, by citing said case in support of the following statement of this Court:

> "* * * When the operation of the law works uniformly as against all parts of the assessment district, and results in a higher cost of the improvement and an increased assessment on all the owners of lands who have paid, *it violates no constitutional rights of theirs as long as their benefits continue respectively to exceed their individual assessments.*" (Italics ours.)

IV.

THAT THE WASHINGTON IRRIGATION DISTRICT STATUTE AS CONSTRUED AND APPLIED BY THE SUPREME COURT OF THAT STATE, IN THE INSTANT CASE, AUTHORIZED A LEVY OF SPECIAL ASSESSMENTS AGAINST A TRACT OF LAND FOR LOCAL IMPROVEMENTS IN SUBSTANTIAL EXCESS OF THE BENEFITS ACCRUING TO SUCH LAND BY REASON OF THE IMPROVEMENTS; AND, AS SO CONSTRUED AND APPLIED, CONTRAVENES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In the light of the foregoing citations and extended research, we assert that whenever due consideration has been given to the nature of a special assessment and the theory on which it is justified, there is no judicial dissent from the proposition

that individual assessments may not be levied in excess of maximum individual benefits. These principles have been given general application, to irrigation district assessments, by the Courts of last resort in states having irrigation district laws.

The Supreme Court of the State of Washington has repeatedly held irrigation assessments to be special assessments, and a holding that they are special assessments is essential to the validity of the irrigation district law under the Constitution of the State of Washington. Yet in the face of these facts we find that, under the decisions of the Supreme Court of the State of Washington, judicial approval is given a mode of assessment which in the operation does authorize a levy by an irrigation district in an unlimited amount.

The allegations set forth in the complaint clearly show facts demonstrating the application of this mode of assessment. The Appellant is helpless and without remedy if it be sanctioned. There is no question as to the meaning of the Washington decisions, and, regardless of what defense they may offer, the Appellees cannot deny that the accepted view of the Washington decisions is that they authorize and sanction the levy of irrigation district special assessments without limit and in an

amount substantially exceeding any individual benefits. The Appellant challenges the correctness of this theory and believes that a protection against the operation of such a theory lies in the guaranties afforded by the Fourteenth Amendment to the Federal Constitution.

A. Analysis of the Decisions of the Supreme Court of the State of Washington Which Lay Down the Theory That Irrigation District Special Assessments May Be Unlimited in Amount.

The case of *State ex rel. Clancy et al. v. Columbia Irrigation District of Stevens County et al,* 121 Wash. 79; 208 Pac. 27, is cited in the opinion of the Supreme Court of the State of Washington, in the case on appeal herein, *Roberts v. Richland Irrigation District et al.,* 69 Wash. Dec. 108, 112; 13 Pac. (2d) 437, 439. (R. 25.), and in the opinion of *State ex rel. Wells v. Hartung et al.,* 150 Wash. 590, 599; 274 Pac. 181, 184, in support of the proposition that irrigation district special assessments can be made without limit.

A careful reading of the opinion of the Court in the case of *State ex rel. Clancy et al. v. Columbia Irrigation District et al., supra,* leads to the following analysis: The Plaintiffs, holders of bonds and

interest coupons past due, applied for a preemptory writ of mandate directed to the Columbia Irrigation District and the County Commissioners and County Treasurer of Stevens County, to compel a levy upon all lands in the district in an amount sufficient to meet payments of bond interest and principal as they came due. In holding that the plaintiffs were entitled to the relief prayed for, it was held, first, that an irrigation district is a municipal corporation when it is considered in relation to its contracts made in the manner prescribed by law; second, the bonds issued by an irrigation district, since they contain an absolute promise to pay, are a general obligation, and hence all the land within the district may be assessed for the payment of the obligation; third, lands acquired by the county are subject to future assessments; fourth, lands acquired by the district are subject to future assessments; fifth, each and every tract within the district is liable for the payment of all the principal and interest due on the outstanding bonds; sixth, the law in force at the time of levying the assessment controlled; seventh, it was not necessary for the bondholders to first resort to the specific lien given by Remington's Revised Statutes, Sec. 7434 (Appendix v.), before applying for a writ of mandate to compel an assessment.

Insofar as consideration of the foregoing legal proposition was necessary to dispose of the issues actually presented, it is not necessary to discuss them here. Insofar as the opinion holds that individual special assessments may be made in excess of individual benefits, it is pure *dicta*. The facts before the Court did not raise the question. We quote from the brief of *Amici Curiae*, L. L. Thompson, Attorney General, and Fred J. Cunningham, Assistant Attorney General:

> "It should be noted that no private property owner, so far as the record shows, has made any objection to the assessments involved herein, nor is the irrigation district contesting the writ of mandamus granted by the trial court. This case involves a contest between the bondholders and the county. * * * The only issues involved in this appeal, then, are those relating to the manner in which assessments should be made and levied by the district and county officials, the amount thereof where the private property owner is not objecting, and the lands which should be included in making and levying such assessments."

A reading of the opinion confirms this statement. There is no evidence before the Court that a threatened individual assessment would exceed the benefit to any particular tract of land, and the statement that each tract of land was liable for the full bonded indebtedness was *dicta*.

The reasoning of the case is this: The bonds of the district, upon their face, contain an absolute promise to pay. They are, therefore, the general obligations of the district, consequently it may levy unlimited assessments for their payment. Hence, these assessments may be levied in excess of benefits.

The fallacy of the Court's reasoning is obvious. Even if it be conceded that the bonds are "the general obligations" of the district, in the sense that they contain an absolute promise to pay, it does not follow that they are the general obligation of each particular tract of land in the district. The district and the landowner are separate entities. The bonds are the general obligation of the district. They are not the obligation of the landowner in any sense. The relationship existing between the bondholders and the district is contractual. The individual landowner is not a party to that contract. It is not the basis of his liability, which is a tax liability justified only by the benefits he actually receives. The Federal constitution is one of the terms of each bond. For the purpose of meeting its obligations, the district is given the authority, under the statute and in conformity with the Federal constitution, to levy special assessments on the lands benefited, but that power does not extend

beyond the provisions of the statute and the constitutional limits thereon. Insofar as the district has unencumbered assets and the power to levy special assessments, it may be required to exhaust them to meet its obligations, but, when the district has exhausted its right to levy special assessments, it must thereafter meet its obligations from assets other than assessments, such as foreclosed land. When all other resources have been exhausted, the district occupies exactly the same position as any other insolvent debtor. The fact that the district cannot meet its obligations does not justify the invasion of the constitutional rights of the individual landowner who has paid the full amount of his benefit.

The assumption, that the power to issue a general obligation, namely, an absolute promise to pay, imports the power to levy unlimited assessments, is obviously fallacious. The statutory authority to a district to issue an absolute promise to pay cannot abrogate the pertinent provisions of the Federal constitution, and create the power to levy unlimited special assessments. The nature of the tax is determined by the functioning of the taxing unit. When its only function is the benefiting of private land by

a cooperative public improvement, its only power to tax is that of special assessment.

The evident source of the Court's error is its failure to take cognizance of the constitutional fundamentals announced in *Norwood v. Baker,* 172 U. S. 269; 19 Sup. Ct. 187; 43 L. Ed. 443, and its attempt to substitute therefor the assumption that the statutory authorization to issue an absolute promise to pay conferred the power to levy unlimited special assessments.

The case of *State ex rel. Wells v. Hartung et al.,* 150 Wash. 590; 274 Pac. 181, is cited in the opinion of the Supreme Court of the State of Washington, in the instant case, as a binding precedent.

> *Roberts v. Richland Irrigation District et al.,* 69 Wash. Dec. 108, 115; 13 Pac. (2d) 437, 440 (R. 29.).

We therefore feel obligated to discuss its pertinent paragraphs.

In that case the bondholders brought an action to compel a levy sufficient to meet the maturing obligations of the district. A landowner intervened, urging the proposition that an assessment could not be made on his land in excess of benefits. The court sustained the contention of the bondholders and held

that assessments could be levied in excess of benefits, a holding based upon the precedent and the legal and logical fallacy of *State ex rel. Clancy v. Columbia Irrigation District of Stevens County,* 121 Wash. 79; 208 Pac. 27.

The court, in *State ex rel. Wells v. Hartung et al.,* 150 Wash. 590, 598; 274 Pac. 181, 184, states the contention of the Appellant to be:

> " * * * that no lands can be subjected to any additional liability than the amount of the benefits to such lands or the statute would be unconstitutional."

It answers this argument with the statement:

> "This Court has determined the constitutionality of such organization acts, upholding their validity. *Board of Directors of the Middle Kittitas Irrigation District v. Peterson,* 4 Wash. 147; 29 Pac. 995; *State ex rel. Witherop v. Brown,* 19 Wash. 383; 53 Pac. 548; *Kinkade v. Witherop,* 29 Wash. 10; 69 Pac. 399."

The answer of the court in said case does not meet the argument of the Appellant therein.

The fact that the constitutionality of a legislative act has been upheld as against one objection does not mean that it may not thereafter be held vulnerable as against other and different constitutional objections. The fact that the general plan

and theory of the irrigation district laws, including the granting of the power to levy assessments, has constitutional sanction does not mean that any and every method of exercising the granted power is constitutional. The cases cited go no farther than to hold that it is competent for the Legislature of the State of Washington to create public corporations for the making of private improvements, and to pay for such improvements through the levy of special assessments.

The question presented in *State ex rel. Wells v. Hartung et al., supra,* and in this case was not presented by the records of nor discussed in any of the cited cases in the above quotation from *State ex rel. Wells v .Hartung et al., supra.*

In this case and in the case of *State ex rel. Wells v. Hartung et al., supra,* a question is raised as to the constitutionality of the manner and extent of the exercise of an admittedly existing power of assessment. The statute creating an irrigation district may be constitutional. It may create an unquestioned right to exercise the power of assessment, but the extent to which that power is exercised in any given case is always open to judicial review.

It is next said, in *State ex rel. Wells v. Hart-*

ung et al., supra, at p. 598 of 150 Wash. and p. 184 of 274 Pac.:

> "A hearing having been provided, after notice, as to the organization, boundaries of and inclusion of lands to be benefited within the district to be organized (Remington's Compiled Statutes, Section 7418), such procedure is universally declared constitutional. *Kinkade v. Witherop,* 29 Wash. 10, 69 Pac. 399; *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112."

In neither of the cases cited in the above quotation was the constitutional question, herein raised, presented or considered.

The sole question presented by this appeal is:

DOES INDIVIDUAL MAXIMUM BENEFIT LIMIT INDIVIDUAL LIABILITY TO PAY ON THE PART OF A LANDOWNER SUBJECT TO SPECIAL ASSESSMENTS IN AN IRRIGATION DISTRICT?

This question was not presented by the facts in *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. 56, nor is it specifically decided, though the decision in that case, as stated on page 176 in 164 U. S., rests upon the assumption that

> "Although there is a marked distinction between an assessment for a local improvement and the levy of a general tax, yet the former is still the exercise of the same power as the

> latter. * * * Assuming that the only theory of these assessments for local improvements upon which they can stand is that they are imposed on account of the benefits received and that no land ought in justice to be assessed for a greater sum than the benefits received by it, yet it is plain that the fact of the amount of benefits is not susceptible of that accurate determination which appertains to a demonstration in geometry."

This assumption was subsequently held by the Supreme Court of California to constitute a binding construction of the Wright Act.

> *Miller & Lux Inc. v. Board of Supervisors of Madera County et al.,* 189 Cal. 254; 208 Pac. 304.

It thus appears that the citations of precedent in the case of *State ex rel. Wells v. Hartung et al., supra,* go no further than to substantiate propositions which were not questioned therein, and to sustain the constitutionality of the irrigation act in certain respects in which it was not attacked but which do not touch the question actually presented, to-wit: the power of the district to levy individual special assessments in excess of individual benefits.

On this question the State Supreme Court relies, in this case, exclusively upon the following logic set forth in *State ex rel. Wells v. Hartung et al.,* 150 Wash. 590, 600; 274 Pac. 181, 185:

> "It must be conclusively presumed from the due adjudication of the organization of the district in 1918 determining the lands to be therein included, the amount of bonds to be issued and the interest to be paid thereon, that the total benefits to the lands comprised in the district were then finally adjudicated. Each tract of land within the district then became generally liable for the payment of the bonds and interest."

The foregoing quotation states the so-called "last faithful acre doctrine." It is obviously fallacious as there is no logical connection between the facts recited in the first sentence and the conclusion drawn in the last sentence. If it is meant thereby to hold that the adjudication of aggregate benefits is an adjudication of individual benefits it is in direct conflict with *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112; 17 Sup. Ct. 56; 41 L. Ed. 369.

Assuming that a hearing for the determination of total benefits is *res adjudicata* on the question of total benefits, does it bind the individual landowner as a determination of the benefit to his tract in the full amount of the aggregate benefit? Such a conclusion is mathematically impossible. It is also impossible, for the reason that the statute makes no provision for a consideration of individual benefits at this hearing.

> " * * * The opinion overlooks the fact that no attempt is made to segregate the obligation at the time it is created, and in fact there is no provision made in the Act for segregation at any time. The Acts by their terms bind the districts as a whole to pay their obligations. * * * "
>
> *State ex rel. Clancy v. Columbia Irrigation District of Stevens County et al.,* 121 Wash. 77, 87; 208 Pac. 27, 30.

The judgment referred to in the above quoted paragraph from *State ex rel. Wells v. Hartung et al., supra,* goes no further than to adjudicate that the irrigation district is a legally constituted public corporation, endowed with certain functions including the power to levy special assessments in a determined aggregate and in a constitutional manner against all the lands within its boundaries. It does not adjudicate in what amounts the individual tracts are benefited. How then can it determine the maximum individual liability of the lands benefited?

The Supreme Court of the United States, in *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112; 41 L. Ed. 369; 17 Sup. Ct. 56, had occasion to make an observation on the distinction between an adjudication approving the district's organization and the inclusion of the respective lands therein,

and an adjudication involving the amount of benefits to each particular tract of land. Far from holding that an adjudication of aggregate benefits on confirmation constituted an adjudication of maximum individual liability, this Court specifically holds that a subsequent allocation of benefits is a constitutional necessity and *that the amount so allocated limits individual liability to pay.*

> " * * * The Legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, i. e. *the amount of the tax which he is to pay. Paulsen v. Portland,* 149 U. S. 30, 41. * * * " (Italics ours.)

Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 174; 17 Sup. Ct. 56; 41 L. Ed. 369.

In *State ex rel. Clancy v. Columbia Irrigation District of Stevens County et al.,* 121 Wash. 77; 208 Pac. 27, it is held that the irrigation district statute neither provides for, nor contemplates a segregation of the obligation. In *State ex rel. Wells v. Hartung et al.,* 150 Wash. 590; 274 Pac. 181, it is held that

the determination of the aggregate benefits to the district automatically determines the maximum liability of each acre. In the case on appeal herein, the Supreme Court of the State of Washington said that, since Remington's Revised Statutes, Sections 7438, 7439 and 7440, provide for an annual equalization of the tax (Appendix vii.),

> " * * * Patently there is no denial of the right of the landowner to a hearing upon the amount of his assessment."
>
> *Roberts v. Richland Irrigation District et al.*, 69 Wash. Dec. 108, 113; 13 Pac. (2d) 437, 439. (R. 27.)

We shall not attempt to reconcile these statements. *Our whole contention and our only contention is that the statute, by express terms, and the Supreme Court of the State of Washington, by its decisions, have expressly authorized the district to disregard maximum individual benefit, however fixed, and levy assessments without limit.*

Whatever confusion there may be in the decisions of the State Supreme Court on other points, there is an absolute unanimity in *State ex rel. Clancy v. Columbia Irrigation District of Stevens County et al., supra; State ex rel. Wells v. Hartung et al., supra,* and the instant case, in holding that,

no matter how fixed, individual benefits do not limit individual assessments, and the maximum individual liability is measured only by the bonded debt. It is this holding which we contend so construes and applies the irrigation district statute as to deprive Appellant of his property without due process of law.

We submit, therefore, that the levy described in Appellant's complaint cannot be justified as a general tax under the decisions of the Supreme Court of the State of Washington. It is not levied for any governmental purpose, nor by a body exercising any governmental functions. It cannot be justified as a special assessment, for the reason that it authorizes the taxing authorities to disregard the maximum individual benefit and levy assessments in substantial excess thereof.

B. Analysis of the Opinion of the State Supreme Court in the Case On Appeal.

The Supreme Court of the State of Washington, in the case on appeal herein, said in its opinion:

> " * * * Lands acquired by the district for unpaid assessments are assets of the district. An added benefit therefrom accrues to the district as a whole and to each landowner individually. Such benefit is a basis, as are the unpaid assessments on other lands within the

district, for the secondary liability to which reference is made in *State ex rel. Wells v. Hartung.*"

Roberts v. Richland Irrigation District et al., 69 Wash. Dec. 108, 113; 13 Pac. (2d) 437, 439. (R. 27.)

The fallacies in this statement are obvious:

1. It is negatived as a matter of fact by the affirmative allegations in the complaint, admitted by the demurrers, that all benefits accruing to the Appellant amounted to a certain sum and that said sum has been paid. (R. 4, 5, 6.) If acquired lands constitute a benefit, it is admitted that that benefit, together with all benefits accruing to the land of Appellant, has heretofore been paid by Appellant. (R. 4.) It is further alleged that said levy is intentionally made without regard to benefits but is based solely on a consideration of the bond requirements. (R. 6.)

2. Legally it is impossible for this Appellant to be "benefited" by lands acquired by the district for unpaid assessments *after he has paid the full amount of benefits accruing to his land.* Sections 7443 to 7445, inclusive, Remington's Revised Statutes of Washington, provide that such lands shall be sold by the district. (Appendix ix.) Section 7434

of Remington's Revised Statutes of Washington states that funds arising from their sale shall be used for the payment of outstanding bonds. (Appendix v.) There is no provision under the statute whereby the "faithful" landowner acquires any portion of those lands, nor any portion of the monies arising from their sale, nor may they be used for further improvement.

3. Further, said sections 7443 to 7445, inclusive, provide that these lands may be sold for their reasonable market value. If that figure is less than the amount of the assessment against them, there will be a deficit, which, under the theory in this case, may be re-assessed against the landowner who has already paid his maximum benefit. How can such added levy constitute an added benefit to the faithful landowner?

Assume, however, that these lands will all be sold for an amount in excess of the assessments against them. The monies arising from the sale are the property of the district and must be applied upon the bonds. No portion of it is ever returned to the individual landowner. The only effect of such payment would be to reduce the number of subsequent assessments in excess of benefits thereafter made against the faithful landowner who has

paid his maximum. If any assessment in excess of the benefit accruing to him by reason of the erection of the improvement is unconstitutional and void, then the only effect of a sale of these lands for an amount in excess of the delinquent assessment would be to reduce the number and amount of illegal levies. How can it be said that he can be benefited by the reduction or the elimination of an assessment, no part of which he is legally obligated to pay?

The idea that acquired lands constitute an added benefit originated in the case of *Cosman v. Chestnut Valley Irrigation District et al.*, 74 Mont. 111; 238 Pac. 879; 40 A. L. R. 1344. Its fallacy is unequivocally acknowledged by the Supreme Court of the State of Montana in the case of *State ex rel. Malott et al. v. Board of Commissioners of Cascade County et al.*, 89 Mont. 37; 296 Pac. 1, 15, in the following language:

> "The holding in the *Cosman* case to the effect that these bonds are general obligations of the district was based upon the assumption that, when the lands were sold, they would bring an amount equaling or exceeding the amount of the delinquencies. As hereinbefore noted, that law has since been amended, so that these lands may now be sold for their fair market value. We have noticed that this change in the law may be made without violating the obligation of the contract with the

bondholders. As pointed out in the *Cosman* case, if the lands upon which there are delinquencies are sold for an amount equaling the taxes and assessments, then the faithful assessment payer suffers nothing more than a temporary disadvantage. The holding in that case did not contemplate that a sale of the land might be made for an amount less than the delinquencies."

We submit that the foregoing analysis demonstrates that the Washington decisions upon the subject are sustained by neither precedent nor principle, and are in direct conflict with the holdings of this court in:

Norwood v. Baker, 172 U. S. 269; 19 Sup. Ct. 187; 43 L. Ed. 443;

Fallbrook Irrigation District v. Bradley, 164 U. S. 112; 17 Sup. Ct. 56; 41 L. Ed. 369;

Kadow et al. v. Paul et al., 274 U. S. 175; 71 L. Ed. 982; 47 Sup. Ct. 561.

We further submit that, insofar as these Washington decisions construe and apply the Washington irrigation district statute, as in this case, to authorize a levy of special assessments against a tract of land for local improvements, in substantial excess of the benefits accruing to such land by reason of the improvements, the statute contravenes the due process

clause of the Fourteenth Amendment to the Constitution of the United States.

C. Analysis of the Case of Kadow Et Al. v. Paul Et Al.

The State Supreme Court herein cites the case of *Kadow et al. v. Paul et al.*, 274 U. S. 175; 71 L. Ed. 982; 47 Sup. Ct. 561, in support of the last faithful acre doctrine, as announced in *State ex rel. Wells v. Hartung et al.*, 150 Wash. 590; 274 Pac. 181.

> *Roberts v. Richland Irrigation District et al.*, 69 Wash. Dec. 108, 114; 13 Pac. (2d) 437, 440. (R. 28.)

A critical examination of the decision of *Kadow et al. v. Paul et al., supra,* is therefore necessary. We submit the following:

Remington's Revised Statutes, Section 4422, which deals with drainage and diking improvement districts, was enacted in its amended form in 1923 (Laws of Washington, 1923, Chap. 46, Sec. 7) and contains the following clause:

> "* * * and all the lands included within the boundaries of the district and assessed for the improvement shall be and remain liable for the costs of the improvement until the same are fully paid."

This provision is practically identical with the provision of our irrigation district statute, Remington's Revised Statutes, Section 7434, (Appendix v.), to-wit:

> "Said bonds and interest thereon * * * shall be paid by revenue derived from an annual assessment upon the real property of the district, *and all the real property in the district shall be and remain liable to be assessed for such payments until fully paid as hereinafter provided.*" (Italics ours.)

This section of the irrigation district statute is the one upon which the State Supreme Court, in its opinion herein, primarily rests its decision.

> *Roberts v. Richland Irrigation District et al.,* 69 Wash. Dec. 108, 112; 13 Pac. (2d) 437, 439. (R. 26.)

Certain landowners undertook to organize a diking improvement district under Remington's Revised Statutes of Washington, Sections 4405 to 4459, inclusive, (as they were amended by the Laws of Washington, 1923, Chapter 46). Certain other landowners brought an action to restrain the defendants from constructing the proposed improvement, and from issuing bonds in payment thereof. One of the contentions (*Kadow et al. v. Paul et al.,* 134 Wash. 539, 553; 236 Pac. 90, 95) was that Remington's Re-

vised Statutes of Washington, Section 4422, (as it was amended in Laws of Washington, 1923, Chapter 46, Section 7) was unconstitutional in that it authorized an assessment in excess of benefits. It is to be noted that the issue arose before the construction of the improvement, the issuance of any bonds, or the making of any levy. The Supreme Court of the State of Washington, on page 95 of 236 Pac. and page 553 of 134 Wash., overruled this contention on the authority of *State ex rel. Clancy v. Columbia Irrigation District of Stevens County,* 121 Wash. 79, 208 Pac. 27, saying:

> " * * * There can be no difference between the two cases. Diking districts as well as irrigation districts are public improvemnets. The cost in each is to be assessed against the property benefited. Of course there is a difference in the details as to the procedure. The obligation created by the statute is a general and not a specific lien against all the property therein,"

and concludes with the following language from the same case on page 554 of 134 Wash., and page 95 of 236 Pac.:

> " * * * So long as the benefits to the entire district are greater than the amount of liability imposed, there can be no constitutional objection to the providing that there shall exist the general or secondary liability."

It will be noted that the court did not specifically state that levies for the "primary" plus "secondary" liability might be levied in excess of benefits but the language used when read in connection with the reference to *State ex rel. Clancy v. Columbia Irrigation District of Stevens County, supra,* does give rise to the inference that so long as the total benefits to the district as a whole exceed the amount of the bonded obligation, the lands therein are liable to an unlimited assessment for the payment thereof. Counsel for the plaintiff in the case of *Kadow et al. v. Paul et al., supra,* so understood it, and appealed to the United States Supreme Court, on the theory that thus construed the statute was unconstitutional in that it authorized assessments against the individual landowner in excess of his individual benefits.

The Supreme Court of the United States, recognizing that the diking district statute would be unconstitutional if so construed, affirmed the decision on the ground that the 1923 amendment *did not authorize an assessment against any particular land in excess of individual benefits.* It is stated in the opinion that the amendment of 1923 did not change the fundamental rule of law laid down in *Foster v. Commissioners of Cowlitz County et al.,*

100 Wash. 502, 512; 171 Pac. 539, 542, where it is said:

> "* * * When it comes to charging the cost of the improvement against the several tracts of land within the district, such charge must be 'in proportion to the benefits accruing thereto,' *and we think the statute also means that no tract of land can be charged in excess of the benefits accruing thereto.*" (Italics ours.)

The United States Supreme Court in *Kadow et al. v. Paul et al.,* 274 U. S. 175, 180, said:

> "It seems clear to us that there is nothing in this amendment which changes the rule of construction of the statute, as laid down by the Supreme Court in the *Foster* case, imposing a limitation in favor of the assessment payers against any supplemental assessment that should exceed the benefits conferred on each one by the improvement.",

and later concludes, on page 181:

> "When the operation of the law works uniformly as against all parts of the assessment district and results in a higher cost of improvement, an increased assessment on all the owners of the land who have paid, it violates no constitutional right of theirs *as long as their benefits continue respectively to exceed their individual assessments.*" (Italics ours.)

We most urgently invite a comparison of the language of the Supreme Court of the United States with the language of the Supreme Court of the State of Washington in the same case. The State Supreme

Court seems to say that as long as the total benefits were equal to the total bonded liability there could be no objection to assessing and re-assessing until the obligations were fully paid. The Supreme Court of the United States, as quoted above, said that there can be no constitutional objection

"* * * as long as their benefits continue *respectively to exceed their individual assessments.*" (Italics ours.)

This holding of the Supreme Court of the United States has since been acquiesced in by the Supreme Court of the State of Washington, in construing the diking laws, in the case of *Boyd et al. v. Cunningham et al.,* 164 Wash. 335; 2 Pac. (2d) 647.

We also invite a comparison of the language of *Foster v. Commissioners of Cowlitz County et al.,* 100 Wash. 502; 171 Pac. 539, and *Boyd et al. v. Cunningham et al., supra,* with the language used in *State ex rel. Clancy v. Columbia Irrigation District of Stevens County,* 121 Wash. 79; 208 Pac. 27, and *State ex rel. Wells v. Hartung et al.,* 150 Wash. 590; 274 Pac. 181.

In its attempted application of the rule laid down by the Supreme Court of the United States in *Kadow et al v. Paul et al.,* 274 U. S. 175; 71 L.

Ed. 982; 47 Sup. Ct. 561, the State Supreme Court herein fails to distinguish between the "cost of the improvement" and "maximum benefit." Ordinarily, the aggregate benefits substantially exceed the aggregate costs of improvement. Hence, the individual benefit exceeds the individual cost of the improvement. If each landowner pays his proportionate share of the cost of the improvement the bonds will be paid before any landowner has paid the full amount of his benefit, but each landowner is at all times liable to be required to pay his maximum benefit in the event delinquencies make it necessary for him to do so in order to discharge the bonds. That liability, however, extends no further than the maximum benefit. Hence, when a landowner has paid, on account of his proportion of the cost of the improvement and delinquencies, a sum equal to his maximum benefit, his liability is fully discharged. No further assessments can be levied against him. This is the *true* holding of *Kadow et al. v. Paul et al., supra.* We do not contend that levies cannot be made for delinquencies. *We do contend, however, that levies for delinquencies cannot be made in excess of maximum individual benefits.*

We submit that *Kadow et al. v. Paul et al.,*

supra, as decided by the Supreme Court of the United States, correctly announced and applied the constitutional principles for which we are here contending. Their application did not require reversal of the Washington Supreme Court by the Supreme Court of the United States in that case for the reason that the diking district had not actually been formed. It had levied no assessments and this Court avoided a reversal by indulging the presumption that, when occasion arose to make an actual levy, the District and the courts would do so in conformity with the constitutional principles set forth in *Foster v. Commissioners of Cowlitz County,* 100 Wash. 502; 171 Pac. 539. This assumption was ultimately realized by the decision in *Boyd et al. v. Cunningham et al.,* 164 Wash. 335; 2 Pac. (2d) 647.

The application of the principle of *Kadow et al. v. Paul et al., supra,* requires a reversal of the present case for the reason that the district has been formed, bonds issued, levies actually made against this Appellant in an amount admittedly in excess of his maximum benefit, and a further levy, in a substantial sum, is admittedly threatened for the purpose of recuperating the delinquencies of other landowners. The district has declared its policy

and intention to continue said levies to whatever extent may be necessary to meet the entire bonded indebtedness (R. 4, 5, 6.), and the Supreme Court of the State of Washington has sustained such levy by reference to Remington's Revised Statutes, Section 7434 (Appendix v.),

> *Roberts v. Richland Irrigation District et al.,* 69 Wash. Dec. 108, 112; 13 Pac. (2d) 437, 439 (R. 26.),

and in reaffirming the declaration in *State ex rel. Wells v. Hartung et al.,* 150 Wash. 590, 600; 274 Pac. 181, 185, to-wit:

> "It must be conclusively presumed from the due adjudication of the organization of the district in 1918 determining the lands to be therein included, the amount of bonds to be issued, and the interest to be paid thereon, that the total benefits to the lands comprised in the district were then finally adjudicated. Each tract of land within the district then became generally liable for the payment of bonds and interest."

The State Supreme Court herein has thus expressly negatived the possibility of the application of the principle of *Foster v. Commissioners of Cowlitz County,* 100 Wash. 502; 171 Pac. 539.

D. Effect of the Holding of the State Supreme Court in the Case on Appeal.

In its final analysis, the State Supreme Court, in its opinion herein, holds that the only legal requisite of a valid special assessment is that it shall be apportioned in accordance with benefits. It is our contention that aggregate individual assessments must not only be apportioned in accordance with maximum individual benefits, *but must be limited to maximum individual benefits.*

There are two requirements for a legal special assessment: (a) uniformity as to all parts of the assessment district; and (b) limitation of the total assessments against a specific tract to the amount of the total benefits conferred thereon.

> "When the operation of the law works uniformly as against all parts of the assessment district, and results in a higher cost of the improvement, and an increased assessment on all the owners of land who have paid, it violates no constitutional right of theirs *as long as their benefits continue respectively to exceed their individual assessments.*" (Italics ours.)
>
> *Kadow et al. v. Paul et al.*, 274 U. S. 175, 181; 71 L. Ed. 982; 47 Sup. Ct. 561.

See also:

> *Foster v. Commissioners of Cowlitz County*, 100 Wash. 502; 171 Pac. 539.

Boyd et al. v. Cunningham et al., 164 Wash. 335; 2 Pac. (2d) 647.

Perkins & Co. v. Diking District No. 3 of Island County, 162 Wash. 227; 298 Pac. 462.

See also the following quotation from *1 Page and Jones on Taxation by Assessment,* p. 197, Sec. 118, 1909 Ed.:

> "If the assessment is not apportioned in substantially the same ratio as the benefits *or if it is substantially in excess thereof, such assessment is invalid as amounting to a taking of property without due process of law.*" (Italics ours.)

Inaccurate use of legal terminology contributes to the confusion of thought found in the decisions of the Supreme Court of the State of Washington. They speak of the primary and secondary liability, terms appropriate in discussing the law of contract but inapplicable to the law of taxation. There is no *primary* and *secondary* liability for a special assessment tax. The individual landowner is liable for the full amount of his maximum benefit. There is but one liability for the maximum benefit. It may be contingent to the extent of the difference between his proportion of the cost of the improvement and the maximum benefit to his land, but it exists by

reason of the benefits which accrue to his land. It continues until he has paid the full amount of that benefit accruing to his land, unless the bonded indebtedness has been discharged before that time. It ceases when that maximum benefit has been paid, whether the bonds have been discharged or not.

CONCLUSION.

In conclusion, we submit that this case is not one of passing or individual importance. Upon it depend the constitutional rights of thousands of tax-burdened farmers. No decision of this Court of comparable importance to the irrigated areas of the West has been handed down since the case of *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112; 17 Sup. Ct. 56; 41 L. Ed. 369, to which the pronouncement in this case must necessarily be a complement. We have, therefore, felt justified in indicating to this Court the holdings of the courts of last resort, in irrigation states, wherein the constitutional principles set forth in *Fallbrook Irrigation District v. Bradley, supra,* have been given practical application during the intervening period of thirty-seven years.

We respectfully submit that we have demonstrated:

(1) That there is a difference, universally recognized by authorities, between the power to tax for general governmental purposes and the power to levy assessments for local improvements, and that the difference affects the circumstances under which and the extent to which each may be levied;

(2) That the levy made by the directors of an irrigation district is a special assessment for a local improvement and is governed by the rules of law relating thereto;

(3) That an assessment against a particular piece of land for local improvements, in substantial excess of the benefits accruing to that particular land by reason of the improvements, constitutes a taking of property without due process of law;

(4) That the Washington Irrigation District statute, as construed and applied by the Supreme Court of that State, in the instant case, authorizes a levy of special assessments against a tract of land for local improvements in substantial excess of the benefits accruing to such land by reason of the improvements; and, as so construed and applied, contravenes the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, we respectfully submit that the judgment of the State Supreme Court, herein, should be reversed.

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APPENDIX.

I.

THE IRRIGATION DISTRICT LAW OF THE STATE OF WASHINGTON.

The Irrigation District Law of the State of Washington is embodied in Remington's Revised Statutes of Washington, Volume 8, Title 48, Chapter 5, Sections 7417 to 7505-5 inclusive, pages 498 to 586 inclusive, pertinent provisions of which are summarized as follows* (Sections 7417-7505, inclusive, pages 1710 to 1761, inclusive, Remington's Compiled Statutes of Washington, 1922, Volume II, Title XLVIII, Chapter IV, as amended by Sections 7417 to 7505-5, inclusive, pages 973 to 999, inclusive, Remington's Compiled Statutes of Washington, 1927 Supplement, Title XLVIII, Chapter IV, and as amended by Chapter 181 of the Session

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*At the time Appellant's Statement as to Jurisdiction was prepared, Remington's Revised Statutes of Washington, which incorporates all the statutes of the State of Washington in one publication, was not published. Appellant in his Statement as to Jurisdiction referred to the earlier publications of the Statutes of the State of Washington and Session Laws of the State of Washington, and so, for the convenience of the Court, the references to these earlier publications and Session Laws will be inserted in parentheses at the end of each paragraph wherein the analogous references are made to Remington's Revised Statutes of Washington.

Laws of the State of Washington for 1929, Sections 1 to 3, inclusive, pages 469 to 474, inclusive, and by Chapter 185 of the Session Laws of the State of Washington for 1929, Sections 1 to 4, inclusive, pages 478 to 487, inclusive.)

Section 7417 of Remington's Revised Statutes of Washington, Vol. 8, page 498, provides that whenever a majority of the holders of title to lands susceptible of "irrigation" desire to provide construction of works for the irrigation of the same, they may propose the organization of an irrigation district, and when so organized such district shall have the powers conferred by law. (Section 7417 of Remington's Compiled Statutes of Washington, 1922, page 1710, as amended by Section 7417, page 973, of Remington's Compiled Statutes of Washington, 1927 Supplement.)

Sections 7417-1 and 7417-2 of Remington's Revised Statutes of Washington, Vol. 8, pages 499 and 500, set forth the purposes and powers of such an irrigation district, to-wit:

> (a) The construction or purchase of works, or parts of same, for the irrigation of lands within the operation of the district.
>
> (b) The construction, repair or improvement of existing irrigation works.

(c) The operation or maintenance of existing irrigation works.

(d) The construction, reconstruction, repair or maintenance of a system of diverting conduits from a natural source of water supply to the point of individual distribution for irrigation purposes.

(e) The execution and performance of any contract authorized by law with any department of the Federal Government or of the State of Washington, for reclamation and irrigation purposes.

(f) The performance of all things necessary to enable the district to exercise the powers herein granted.

(g) To purchase, and sell electric power to the inhabitants of the irrigation district for the purposes of irrigation and domestic use.

(h) To construct, repair, purchase, maintain or lease a system for the sale or lease of water to the owners of irrigated lands within the district for domestic purposes.

(i) To construct, repair, operate and maintain a system of drains, as herein provided.

(j) To assume, as principal or guarantor, any indebtedness to the United States under the Federal reclamation laws, on account of district lands.

(Sections 7417-1 and 7417-2, pages 973 and 974, Remington's Compiled Statutes of Washington, 1927 Supplement.)

Sections 7418 to 7427, inclusive, of Remington's Revised Statutes of Washintgon, Vol. 8, pages 500 to 512, inclusive, prescribe the steps to be taken to form an irrigation district, including the election of a Board of Directors. (Sections 7418 and 7419, pages 1710 to 1714, inclusive, of Remington's Compiled Statutes of Washington, 1922, as amended by Sections 7418 and 7419, pages 974 to 977, inclusive, of Remington's Compiled Statutes of Washington, 1927 Supplement, and Sections 7420 to 7427, inclusive, pages 1714 to 1719, inclusive, Remington's Compiled Statutes of Washington, 1922.)

Sections 7428 to 7431½-6, inclusive, of Remington's Revised Statutes of Washington, Vol. 8, pages 512 to 522, inclusive, describe and set forth the powers and duties of said Board of Directors. (Section 7428, page 1719, Section 7429, page 1720, Section 7430, page 1722, and Section 7431, page 1723, of Remington's Compiled Statutes of Washington, 1922, and Sections 7428-1, 7428-2, 7428-3, page 978, and Section 7429-1, page 979, and Sections 7431½, 7431½-1, 7431½-2, 7431½-3, 7431½-4, 7431½-5, 7431½-6, pages 979 and 980, of Remington's Compiled Statutes of Washington, 1927 Supplement.)

Sections 7432 to 7435, inclusive, of Remington's

Revised Statutes of Washington, Vol. 8, pages 522 to 534, inclusive, authorize the districts to issue and sell bonds for the purposes therein mentioned, and to prescribe the necessary steps therefor, the necessary investigation prior to the sale of said bonds, and the conditions and terms of said bonds. (Section 7433, page 1726, Section 7434, page 1726, and Section 7435, page 1727, of Remington's Compiled Statutes of Washington, 1922, and Section 7432, page 1723, of Remington's Compiled Statutes of Washington, 1922, as amended by Section 7432, page 981, of Remington's Compiled Statutes of Washington, 1927 Supplement, and Sections 7432-1 to 7432-14, inclusive, pages 984 to 987, inclusive, and Sections 7434-1 to 7434-7, inclusive, pages 988 and 989, of Remington's Compiled Statutes of Washington, 1927 Supplement.)

Section 7434 of Remington's Revised Statutes of Washington, Vol. 8, page 531, provides:

> "Said bonds and interest thereon * * * shall be paid by revenue derived from an annual assessment upon the real property of the district, *and all the real property in the district shall be and remain liable to be assessed for such payments until fully paid as hereinafter provided.*" (Italics ours.)

This section also provides for a lien upon the

property of a district in favor of said bonds and gives a right of foreclosure thereof.

Section 7436 of Remington's Revised Statutes of Washington, Vol. 8, page 535, provides as follows:

> "*Assessments made in order to carry out the purpose of this act shall be made in proportion to the benefits accruing to the lands assessed* and equitable credit shall be given to the lands having a partial or full water right. * * * The secretary must, between the first Monday in March and the first Tuesday in September in each year * * * prepare an assessment roll with appropriate headings in which must be listed all the lands within the district. In such book must be specified, in separate columns, under the appropriate headings:
>
> "First, the name of the person to whom the property is assessed. * * *
>
> "Second, land by township, * * * giving an estimate of the number of acres. * * *
>
> "Third, in further columns with appropriate headings shall be specified the ratio of benefits, or, when deemed by the secretary more practicable, the per acre value, or the amount of benefits, for general and special district purposes, and the total amount assessed against each tract of land." (Italics ours.)
>
> (Section 7436, pages 1727 and 1728, Remington's Compiled Statutes of Washington, 1922.)

Section 7438 of Remington's Revised Statutes of Washington, Vol. 8, page 536, provides that before the first Tuesday in November in each year the secretary must complete his assessment-roll and deliver it to the board, which shall give notice thereof, and of the time the board, acting as a board of equalization, will meet to equalize assessments.

(Section 7438, pages 1728 and 1729, Remington's Compiled Statutes of Washington, 1922.)

Section 7439 of Remington's Revised Statutes of Washington, Vol. 8, page 537, requires the board

> "* * * to hear and determine such objections to the said assessment-roll as may come before them; and the board may change the same as may be just."

(Section 7439, page 1729, Remington's Compiled Statutes of Washington, 1922.)

Section 7440 of Remington's Revised Statutes of Washington, Vol. 8, pages 537 to 539, inclusive, provides that:

> "The board of directors shall in each year * * * levy an assessment sufficient to raise the ensuing annual interest on the outstanding bonds, * * *

and

> "Beginning in the year preceding the maturity of the first series of the bonds of any

issue, the board must from year to year increase said assessment for the ensuing years in an amount sufficient to pay and discharge the outstanding bonds as they mature. * * * *The board shall also at the time of making the annual levy, estimate the amount of all probable delinquencies on said levy and shall thereupon levy a sufficient amount to cover the same and a further amount sufficient to cover any deficit that may have resulted from delinquent assessmnets for any preceding year.* * *

"If the annual assessment roll of any district has not been delivered to the county treasurer * * * or if said roll when delivered is not equalized and the required assessments levied as required by law, or if for any reason the required assessment or levy has not been made, the county treasurer shall immediately notify the board of county commissioners of the county in which the office of the board of directors is situated, and said board of county commissioners shall cause an assessment roll for the said district to be prepared and shall equalize the same if necessary and make the levy required by this chapter in the same manner and with like effect as if the same had been equalized and made by the said board of directors, and all expenses incident thereto shall be borne by the district. * * *

"At the time of making the annual levy in the year preceding the final maturity of any issue of district bonds, the board of directors shall levy a sufficient amount to pay and redeem all bonds of said issue then remaining unpaid. * * *" (Italics ours.)

(Chapter 185, Section 1, pages 478 to 482, in-

clusive, of the Session Laws of 1929 of the State of Washington, which amends Section 7440, page 990, of Remington's Compiled Statutes of Washington, 1927 Supplement, which amends Section 7440, page 1729, Remington's Compiled Statutes of Washington, 1922.)

Section 7441 of Remington's Revised Statutes of Washington, Vol. 8, page 540, provides that the assessment upon real property shall be a lien against the property assessed. (Section 7441, pages 1730 and 1731, Remington's Compiled Statutes of Washington, 1922.)

Sections 7442 to 7442-2, inclusive, of Remington's Revised Statutes of Washington, Vol. 8, pages 541 to 544, inclusive, provide for the collection of the assessment. (Section 7442, pages 1731 and 1732, Remington's Compiled Statutes of Washington, 1922, as amended by Chapter 181 of the Session Laws of 1929 of the State of Washington, Section 1, pages 469 to 472, inclusive, and Sections 7442-1 and 7442-2, pages 992 and 993, Remington's Compiled Statutes of Washington, 1927 Supplement.)

Sections 7443 to 7445, inclusive, Remington's Revised Statutes of Washington, Vol. 8, pages 544

to 547, inclusive, provide for the sale of property for delinquent assessments, including a provision that if there is no purchaser in good faith when the property is offered for sale a second time, the whole amount of the property assessed shall be struck off to the irrigation district as the purchaser, and the district is thereupon endowed with the same rights in said property as a private purchaser, and may, if said property is not redeemed, sell it at its *reasonable market value.* (Sections 7443 to 7445, inclusive, pages 1732 to 1735, inclusive, Remington's Compiled Statutes of Washington, 1922, as amended by Chapter 181 of the Session Laws of 1929 of the State of Washington, Sections 2 and 3, pages 472 to 474, inclusive.)

The remaining sections of the Statute, not heretofore referred to, deal with administrative and operative problems not involved in this appeal.

II.

PERTINENT PROVISIONS OF THE CONSTITUTION OF THE STATE OF WASHINGTON.

A.

Section 9 of Article VII of the Constitution of the State of Washington, set forth in Reming-

ton's Revised Statutes of Washington, Vol. 1, page 448:

> "The legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of property benefited. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same."

*(Section 9 of Article VII of the Constitution of the State of Washington is also set forth in Remington's Compiled Statutes of Washigton, 1922, Vol. 1, page 89.)

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*At the time Appellant's Statement as to Jurisdiction was prepared, Remington's Revised Statutes of Washington, which incorporates all the statutes of the State of Washington in one publication, was not published. Appellant in his Statement as to Jurisdiction referred to the earlier publications of the Statutes of the State of Washington and Session Laws of the State of Washington, and so, for the convenience of the Court, the references to these earlier publications and Session Laws will be inserted in parentheses at the end of each paragraph wherein the analogous references are made to Remington's Revised Statutes of Washington.

B.

Section 6 of Article VIII of the Constitution of the State of Washington, set forth in Remington's Revised Statutes of Washington, Vol. 1, page 454:

> "No county, city, town, school district, or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county, city, town, school district, or other municipal corporation, without the assent of three-fifths of the voters therein voting at an election to be held for that purpose, nor in cases requiring such assent shall the total indebtedness at any time exceed five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county purposes previous to the incurring of such indebtedness, except that in incorporated cities the assessment shall be taken from the last assessment for city purposes: Provided, that no part of the indebtedness allowed in this section shall be incurred for any purpose other than strictly county, city, town, school district, or other municipal purposes: Provided, further, that any city or town, with such assent, may be allowed to become indebted to a larger amount, but not exceeding five per centum additional for supplying such city or town with water, artificial light, and sewers, when the works for supplying such water, light, and sewers shall be owned and controlled by the municipality."

(Section 6 of Article VIII of the Constitution of the State of Washington is also set forth in

Remington's Compiled Statutes of Washington, 1922, Vol. 1, page 92.)

C.

Amendment 14 to the Constitution of the State of Washington, set forth in Remington's Revised Statutes of Washington, Vol. 1, pages 526 and 527:

"Article VII is amended by striking out all of sections 1, 2, 3 and 4, and inserting in lieu thereof the following, to be known as Section 1:

"ART. VII, Sec. 1. The power of taxation shall never be suspended, surrendered or contracted away. All taxes shall be uniform upon the same class of property, within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only. The word 'property' as used herein, shall mean and include everything, whether tangible or intangible, subject to ownership. All real estate shall constitute one class: Provided: That the legislature may tax mines and mineral resources and lands devoted to reforestation by either a yield tax or an *ad valorem* tax at such rate as it may fix, or by both. Such property as the legislature may by general laws provide shall be exempt from taxation. Property of the United States and of the state, counties, school districts and other municipal corporations, and credits secured by property actually taxed in this state, not exceeding in value the value of such property, shall be exempt from taxation. The legislature shall have power, by appropriate legislation, to exempt personal property to the amount

of Three Hundred ($300.00) Dollars for each head of a family liable to assessment and taxation under the provisions of the laws of this state of which the individual is the actual *bona fide* owner."

(Laws of Washington, 1929, Chapter 191, Section 1, page 499.)

This Amendment strikes out Sections 1, 2, 3 and 4 of Article VII of the Constitution of the State of Washington, but at the same time reenacts the material portions thereof relevant herein. Sections 1, 2, 3 and 4 of Article VII of the Constitution of the State of Washington are set forth in Remington's Revised Statute of Washington, Volume 1, pages 441, 442 and 447:

"Sec. 1. All property in the state not exempt under the laws of the United States, or under this constitution shall be taxed in proportion to its value, to be ascertained as provided by law. The legislature shall provide by law for an annual tax sufficient, with other sources of revenue, to defray the estimated ordinary expenses of the state for each fiscal year. And for the purpose of paying the state debt, if there be any, the legislature shall provide for levying a tax annually, sufficient to pay the annual interest and principal of such debt within twenty years from the final passage of the law creating the debt.

"Sec. 2. The legislature shall provide by law a uniform and equal rate of assessment

and taxation on all property in the state, according to its value in money, and shall prescribe such regulation by general law as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property: Provided, that a deduction of debts from credits may be authorized: Provided, further, that the property of the United States, and of the state, counties, school districts, and other municipal corporations, and such other property as the legislature may by general laws provide, shall be exempt from taxation.

"Sec. 3. The legislature shall provide by general law for the assessing and levying of taxes on all corporation property as near as may be by the same methods as are provided for the assessing and levying of taxes on individual property.

"Sec. 4. The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the state shall be a party."

(Sections 1, 2, 3 and 4 of Article VII of the Constitution of the State of Washington are also set forth in Remington's Compiled Statutes of Washington, 1922, Volume 1, pages 87 and 88.)